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United States
Circuit Court of Appeals
For the Ninth Circuit.

SUSAN AVERY JONES,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

MAR 15 1945

PAUL P. O'BRIEN,
CLERK

No. 10983

United States
Circuit Court of Appeals
For the Ninth Circuit.

SUSAN AVERY JONES,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

JOHN T. RILEY, Esq.,

DARIUS F. JOHNSON, Esq.

For Comm'r:

BYRON M. COON, Esq.

DOCKET No. 676

MRS. SUSAN AVERY JONES, Amended Title:
Susan Avery Jones, See Order 2/18/43,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1943

Feb. 2—Petition received and filed. Taxpayer notified. Fee paid.

Feb. 2—Copy of petition served on General Counsel.

Feb. 2—Motion for Circuit hearing in Los Angeles, filed by taxpayer. 2/2/43 Granted.

Feb. 18—Motion to amend caption filed by taxpayer.

Feb. 18—Order amending caption to read, Susan Avery Jones, entered.

Feb. 26—Answer filed by General Counsel.

1943

Mar. 3—Copy of answer served on taxpayer.
Los Angeles, California.

1944

Feb. 29—Hearing set April 24, 1944 in Los Angeles,
California.

May 4—Hearing had before Judge Hill on merits.
Briefs due 6/19/44 simultaneously. Re-
plies 7/10/44.

Jun. 10—Transcript of hearing 5/4/44 filed.

Jun. 14—Motion for extension to June 30, 1944
to file respondent's brief, filed by General
Counsel. 6/15/44 Granted.

Jun. 15—Brief filed by taxpayer.

Jun. 28—Brief filed by General Counsel. 6/29/44
Copy served.

Jul. 17—Reply brief filed by taxpayer.

Oct. 10—Memorandum findings of fact and opinion
rendered. Judge Hill. Decision will be
entered for respondent. Copies served.

Oct. 10—Decision entered. Judge Hill. Div. 2.

1945

Jan. 5—Petition for review by U. S. Circuit Court
of Appeals, 9th Circuit, with assignments
of error filed by taxpayer, with proof of
service thereon.

Jan. 5—Praecipe for record filed by taxpayer with
proof of service thereon. [1*]

*Page numbering appearing at top of page of original certified
Transcript of Record.

The Tax Court of the United States

Docket No. 676

MRS. SUSAN AVERY JONES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, Symbols LA:IT:90D;PB, dated November 10, 1942, and as a basis of his appeal alleges as follows:

(1) The Petitioner is an individual residing in Los Angeles, California, whose address is 13746 Sunset Boulevard, Pacific Palisades, California. The return for the period here involved was filed with the Collector for the Sixth District of California.

(2) The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the Petitioner on November 10, 1942.

(3) The taxes in controversy are income taxes for the year 1940 in the amount of \$4,781.48.

(4) The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) In determining net income, Respondent has failed to allow as a deduction loss sustained upon

sale of vacant property in the amount of \$17,560.60.

(5) The facts upon which the Petitioner relies as a basis of this proceeding are as follows: [2]

(a) Petitioner and her husband, Grover Jones, purchased during the year 1928 a piece of unimproved real estate, title being taken in joint tenancy. Petitioner's husband died on September 24, 1940. The original purchase price of this property was \$16,500.00. This property was known as "Tiger Tail." During the month of August, 1930, Petitioner and her husband purchased real estate improved with dwelling that was used as their home, said real estate being situated at 13746 Sunset Boulevard, Pacific Palisades, California. This latter property was used continuously from the time acquired as the home and residence of Petitioner and her husband. The property is still occupied by Petitioner as her home. At the time the unimproved property was acquired in 1928, it was the intention of the Petitioner and her husband to erect their personal dwelling thereon. They abandoned this idea when they acquired the other personal dwelling which they occupied continuously.

In 1930 at the time they acquired their personal dwelling, Petitioner and her husband held the other property for the purpose of selling same at a profit. The property was never improved with a dwelling house; however, Petitioner and her husband did install small pools, sprinkler system, cement walls and fenced the property, planted shrubbery and trees for the purpose of enhancing its value for

facilitating its sale at a profit. They expended not less than \$13,500.00 for improvements of the type mentioned. Petitioner and her husband contemplated building a house upon the property to facilitate its sale and to [3] enable them to realize a greater profit, and shortly prior to the death of Petitioner's husband, they contemplated borrowing sufficient money to accomplish this purpose. Petitioner, during the month of December, 1940, after the death of her husband, sold the property for the sum of \$7,500.00.

(6) Petitioner prays for relief from the deficiency asserted by the Respondent on the following and each of the following particulars:

(a) Petitioner's net income should be recomputed by allowing loss sustained upon sale of vacant real estate.

Wherefore, Petitioner prays that this Board may hear and redetermine the deficiency herein alleged.

JOHN T. RILEY

DARIUS F. JOHNSON

Counsel for Petitioner, 427
Title Insurance Building,
Los Angeles, California. [4]

State of California,

County of Los Angeles—ss.

Mrs. Susan Avery Jones, being duly sworn, says that she is the Petitioner above named; that she has read the foregoing Petition or had the same read to her and is familiar with the statements therein contained; that the facts therein stated are

true except such facts as are recited to be upon information and belief and those facts she believes to be true.

SUSAN AVERY JONES

Subscribed and sworn to before me this 28th day of January, 1943.

[Seal] LYDIA CONRAD

Nearly Public in and for the County of Los Angeles,
State of California.

My Commission expires May 8, 1944. [5]

EXHIBIT "A"

Treasury Department

Internal Revenue Service

Twelfth Floor, U. S. Post Office and Courthouse
Los Angeles, Calif.

Nov. 10, 1942

Office of

Internal Revenue Agent in Charge

Los Angeles Division

LA:IT:90D:PB

Mrs. Susan Avery Jones,
13746 Sunset Boulevard,
Pacific Palisades, California.

Madam:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1940 discloses a deficiency of \$4,-781.48 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the

deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment for the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after the filing of the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By GEORGE D. MARTIN /s/

Internal Revenue Agent in
Charge

Enclosures:

Statement.

Form of waiver. [6]

STATEMENT

LA:IT:90D:PB

Mrs. Susan Avery Jones,
13746 Sunset Boulevard,
Pacific Palisades, California.

Tax Liability for the Taxable Year Ended
December 31, 1940

	Liability	Assessed	Deficiency
Income tax	\$5,469.73	\$ 688.25	\$4,781.48

A copy of this letter and statement has been mailed to your representative, Mr. John T. Riley, 433 South Spring, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustment to Net Income

Net income as disclosed by return.....\$10,014.50

Additional income and unallowable deductions:

(a) Salary received	\$ 1,000.00	
(b) Taxes disallowed	7.86	
(c) Unemployment insurance disallowed	318.75	
(d) Loss disallowed	17,560.00	18,887.21

Total\$28,901.71

Additional deductions:

(e) Advertising expense	\$ 313.75	
(f) Business loss	174.80	488.55

Net income adjusted\$28,413.16

[7]

Explanation of Adjustments

(a) The one-half of your husband's net income included in your return is understated \$1,000.00 due

to an understatement of \$2,000.00 in the amount of salary received from Universal Pictures Company, Inc.

(b) and (c) In the computation of your husband's net income of which one-half is included in your return, the deductions claimed for taxes and unemployment insurance are excessive in the respective amounts of \$15.72 and \$637.50, and accordingly the amounts of \$7.86 and \$318.75 are added to your income.

(d) In your return you deducted a loss from the sale of property in the amount of \$17,560.60. **This loss is not an allowable deduction** within the meaning of section 23(e)(1) and section 23(e)(2) of the Internal Revenue Code, since it does not appear that this loss results from a transaction entered into for profit, or that it was incurred in trade or business.

(e) In the computation of your husband's net income of which one-half is included in your return, an allowable deduction of \$627.50 for advertising was not claimed, and accordingly your income is reduced \$313.75.

(f) The entire amount of business loss of \$349.71 from Grover Jones Enterprises, as computed in your return, is deductible in your return, whereas only \$174.81 thereof has been claimed as a deduction in your return. Accordingly an additional deduction of \$174.80 is allowed. [8]

Computation of Tax

Net income adjusted	\$28,413.16
Less: Personal exemption	\$ 500.00
Credit for dependent	300.00 800.00
Balance (surtax net income).....	\$27,613.16
Less: Earned income credit	1,400.00
Net income subject to normal tax.....	\$26,213.16
Normal tax at 4% on \$26,213.16.....	\$ 1,048.53
Surtax on \$27,613.16	3,923.95
Total normal tax and surtax	\$ 4,972.48
Defense tax (10% of \$4,972.48).....	497.25
Total income tax	\$ 5,469.73
Correct income tax liability	\$ 5,469.73
Income tax assessed:	
Original, account No. 208765	688.25
Deficiency of income tax	\$ 4,781.48

[Endorsed]: T. C. U. S. Filed Feb. 2, 1943. [9]

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) and (2) Admits the allegations contained in paragraphs (1) and (2) of the petition.

(3) Admits that the taxes in controversy are

income taxes for the year 1940, but denies the remainder of paragraph (3) of the petition.

(4) Denies the allegations of error contained in paragraph (4) of the petition.

(5) For lack of sufficient information upon the basis of which to form an opinion as to the truth or correctness thereof, the respondent denies the allegations contained in paragraph (5) of the petition. [10]

(6) Denies petitioner is entitled to the relief prayed for in paragraph (6) of the petition.

(7) Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL BHN

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

ALVA C. BAIRD,
Division Counsel.

B. H. NEBLETT,

B. M. COON,

Special Attorneys, Bureau of
Internal Revenue.

ppw 2-19-43

[Endorsed]: T.C.U.S. Filed Feb. 26, 1943. [11]

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT
AND OPINION

Hill, Judge: This proceeding involves an income tax deficiency for the year 1940 in the sum of \$4,781.48. Several adjustments to petitioner's income were made by respondent but this proceeding challenges only one. The sole issue is whether respondent erred in refusing to allow as a deduction a loss sustained on the sale of certain real estate. The case was heard upon oral and documentary evidence.

FINDING OF FACTS

Petitioner is an individual residing in Los Angeles, California. She filed her income tax return for 1940 with the collector of internal [12] revenue for the sixth district of California. She is the widow of Grover Jones, a highly successful author and scenario writer, who died in September, 1940.

In 1927 petitioner and her then husband, Grover Jones, entered into a contract for the purchase of certain real estate in Beverly Hills, California, hereinafter referred to as Tiger Tail. The purchase price was \$16,500. Payments were completed in May 1931 and at that time petitioner and her husband received a deed to this property as joint tenants. The lot was irregularly shaped and at the time of purchase, petitioner and her husband were advised by the broker that they would have no difficulty in buying an adjoining lot at a low price, which would fill out the tract to form a rectangular

piece. Petitioner and her husband purchased this property intending to build a home thereon. When the payments were finally completed and the deed received, petitioner's husband commenced negotiations for the so-called corner lot which he felt was needed to complete the tract. The owner of this lot was a non-resident and when his price for the property was made known, Jones decided immediately that he would not pay it, but that he would build his home elsewhere. He asked his real estate broker to list Tiger Tail for sale and very soon thereafter purchased a residence on Sunset Boulevard, and occupied it with petitioner as their home. During the period from June 1931 to 1937 petitioner and her husband purchased additional ground for the Sunset Boulevard home and eventually in 1937 razed the original building and erected a palatial mansion with extensive landscaping, elaborate dog kennels, a swimming pool and other improvements found only in the most expensive [13] homes. The total cost was approximately \$250,000. Its original cost was not in excess of \$27,500.

When the petitioner and her husband purchased the home on Sunset Boulevard they abandoned any intention to build their future home on Tiger Tail. During 1932 and 1933 they spent large sums of money improving it as a residential site, which included installations of a sprinkler system, a driveway, the building of a road along one side of the property, and other extensive improvements, including the planting of trees and shrubs. This was done in an effort to make the property more salable

and to minimize their loss in this connection. No buildings were ever erected and the property never produced any income.

On several occasions Jones was offered \$10,000 for Tiger Tail and each time he refused to accept. He had become so enraged over his inability to acquire the small lot needed to complete Tiger Tail that he refused to sell unless he got his money out of it. On several occasions real estate men discussed with Jones the possibility of trades and exchanges for ranches but nothing ever came of these discussions. After Jones' death in September, 1940 petitioner sold Tiger Tail for \$7,500. The value of Tiger Tail in May or June, 1931, when petitioner and her husband purchased the home on Sunset Boulevard, was \$16,500. The money and effort expended by petitioner and her husband after June 1931 to promote the sale of Tiger Tail do not constitute a transaction entered into for profit.

OPINION

In her income tax return for 1940 petitioner deducted as an ordinary loss the sum of \$17,560.60 as arising out of the sale of Tiger Tail in [14] December 1940 for \$7,500. Respondent, in addition to other adjustments not here material, denied the deduction as not incurred in any transaction entered into for profit within the meaning of section 23 (e)(2) of the Internal Revenue Code. That section reads as follows:

Sec. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

(e) Losses by Individuals.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business: * * *

At the trial of this case the parties agreed that the value of the property in May or June 1931 was \$16,500 and that if petitioner is correct in her contention the actual loss amounts to \$9,000.

Petitioner argues that when Tiger Tail was abandoned as a possible future home it became a transaction entered into for profit. She urges that the money spent by her and her husband in improving it together with listing it for sale with brokers demonstrate that it was held for profit within the meaning of this section. Respondent argues that there was no overt act which definitely committed the Joneses to holding it for profit so as to entitle petitioner to the deduction.

It is apparent that the original purchase of Tiger Tail was for the personal benefit of the Joneses who planned to build their home there. [15] Did the abandonment of the property for this purpose, coupled with the extensive improvements and the purchase and occupancy of a residence elsewhere, convert it into a transaction entered into for profit

within the meaning of the above section? We think that it did not.

The cases cited by petitioner in her brief deal in the main with properties which were rented or otherwise devoted to the production of income. *Heiner v. Tindle*, 276 U. S. 582, the leading authority for cases of this type, and other similar cases decided since that decision, all turned on the happening of some event which ended the personal residential character of the property. In the *Tindle* case it was the leasing of the residence that the court singled out as marking the transition. The leasing demonstrated an intent on the part of the owner to convert the property to income purposes. Counsel argue that petitioner should not be penalized for failure to procure income from property where no buildings existed to supply the income. It is not the lack of buildings and rental income therefrom which is responsible for our decision. We do not think that the dealings of petitioner and her husband with *Tiger Tail*, after the purchase of the *Sunset Boulevard* property, amount to a transaction within the meaning of this section. The evidence is uncontradicted that the money spent by petitioner and her husband on *Tiger Tail* was to minimize their loss. Minimizing a loss is not profit. See *Bowers v. Kerbaugh-Empire Co.*, 271 U. S. 170. The *Tiger Tail* transaction was entered into for personal reasons. Nothing petitioner or her husband did in connection therewith caused it to lose this character. Improvements made by petitioner and her husband were

ordinary and customary in landscaping a tract for
[16]
residential use. The sprinkler system, the driveway, the terrace, the shrubbery and trees, all these made the property more desirable from their standpoint as well as prospective purchasers. At any time petitioner and her husband could have erected a home thereon and had the benefits of their expenditures. There is no evidence of any zoning laws which restricted the use of the property. This was a comparatively large tract of land, approximately three-fourths of an acre, and the owners could have conceivably divided it into smaller but still attractively sized building lots, in keeping with the smaller homes erected nearby. No effort was made to rent it for any purpose. The fact that the property was listed for sale with various brokers and that several trades were suggested involving ranch property is not persuasive. The mere listing of residential property with a broker without more is insufficient to transform it into property dealt with for profit within the meaning of section 23 (e)(2). *Morgan v. Commissioner*, 76 Fed. (2d) 390. Some additional act or event in connection with the property is necessary. This can be illustrated by leasing or renting, by remodeling or by any other act which would show a clear cut intention on the part of the owner to change the character of the Property. *Runsey v. Commissioner*, 82 Fed. (2d) 158. Cert. denied. Nothing in this record convinces us that petitioner has sustained her burden of showing that the deal-

ings with Tiger Tail amounted to a transaction entered into for profit.

Entered:

Decision will be entered for respondent.

[Seal] Entered Oct. 10, 1944. [17]

The Tax Court of The United States
Washington

Docket No. 676

SUSAN AVERY JONES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered October 10, 1944, it is

Ordered and Decided: That there is a deficiency in income tax of \$4,781.48 for the calendar year 1940.

(Signed) SAM B. HILL,
Judge.

Enter:

Entered Oct. 10, 1944. [18]

[Title of Tax Court and Cause.]

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED STATES

To the Honorable The Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The Petition of Susan Avery Jones respectfully
shows:

I.

This is a proceeding under Paragraph 1141, Title 26 United States Code, for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision of The Tax Court of the United States, entered October 10, 1944, determining a deficiency in income taxes of the above named Petitioner, for the calendar year 1940, in the amount of \$4,781.48; Petitioner having filed her income tax return for the year 1940, with the Collector of Internal Revenue for the Sixth Collection District of California, said Collection District being within the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit.

II.

STATEMENT OF THE NATURE OF THE
CONTROVERSY

The question presented in this Appeal is whether or not [19] Petitioner may deduct the loss sustained upon the sale of certain real estate in the year 1940.

In 1927, the Petitioner and her husband, Grover Jones, now deceased, entered into a contract for the purchase of certain real estate in Beverly Hills,

California, herein referred to as the "Tiger Tail property". The purchase price was \$16,500.00. Payments were completed in 1931, whereupon Petitioner and her husband received a deed to the property as joint tenants. This property was purchased by the Petitioner and her husband with the intention of erecting a personal residence thereon. The property was irregular in shape and before starting construction of buildings Petitioner and her husband endeavored to purchase certain adjoining land in order to complete the rectangular shape of the property. In May or June of 1931, being unable to acquire the adjoining land at an acceptable price, Petitioner and her husband abandoned the intention of erecting a personal residence thereon and purchased other property which was improved with a residence. During 1932 and 1933, considerable money was spent on the Tiger Tail property which included installation of a sprinkler system, driveway, and other expensive improvements including planting of trees and shrubs, and the property was listed for sale. It was stipulated by the parties hereto, that at the time the residence property was purchased, the Tiger Tail property had a value of \$16,500.00. In 1940, said property was sold for \$7,500.00, resulting in a loss of \$9,000.00.

The Petitioner deducted the sum of \$17,560.60 on her income tax return for the year 1940. The Respondent herein disallowed said loss holding that it did not appear that the loss resulted from a transaction entered into for profit. At the trial of the case it was stipulated that the loss, if determined by the

Court to have been sustained in a transaction entered into for profit, should be allowed in the sum of \$9,000.00. [20]

III.

CONTENTION OF THE PETITIONER

The Petitioner contended before The Tax Court of the United States that the action of the Respondent was erroneous for the reason that when she and her husband purchased another property for their residence, they abandoned the intention of erecting a residence on the Tiger Tail Property; that their expenditure of money improving said Tiger Tail property to make it more salable, and listing it for sale, converted it into a transaction entered into for profit. Petitioner further contended that the loss so sustained was deductible for income tax purposes.

IV.

HOLDING OF THE COURT

The Tax Court of the United States, however, sustained the determination of the Respondent and held that the loss on the sale of the property was not deductible since it did not result from a transaction entered into for profit and that the expenditure of money after the abandonment of the intention of erecting a personal residence thereon, and listing it for sale, did not convert the transaction to a transaction entered into for profit.

V.

DESIGNATION OF COURT OF REVIEW

The Petitioner, being aggrieved by the said decision of The Tax Court of the United States, and having at all times had her residence in the County of Los Angeles, State of California, and having filed her income tax return for the Calendar year 1940 with the Collector of Internal Revenue of the Sixth Collection District of California, desires a review of said decision by The Circuit Court of Appeals for the Ninth Circuit. [21]

VI.

ASSIGNMENT OF ERROR

The Petitioner, as a basis of review, makes the following assignments of error:

First. The Tax Court of the United States erred in determining a deficiency in tax against the Petitioner for the year 1940, in the sum of \$4,781.48.

Second. The Tax Court of the United States erred in determining that the transaction resulting in a loss of \$9,000.00 to the Petitioner was not a loss sustained in a transaction entered into for profit under Section 23 (e) (2) of the Internal Revenue Code.

Third. The Tax Court of the United States erred in that the conclusions of law set forth in its opinion are contrary to and not in harmony with the Court's findings of fact.

Wherefore, your Petitioner prays that the Circuit Court of Appeals for the Ninth Circuit may review

said decision and modify the same in accordance with the Petitioner's contentions.

JOHN T. RILEY and

DARIUS F. JOHNSON

By /s/ JOHN T. RILEY

Counsel for Petitioner, 427

Title Insurance Bldg., Los

Angeles 13, California.

State of California,

County of Los Angeles—ss.

John T. Riley, being first duly sworn, says that he is counsel of record in the above entitled cause; that, as such counsel, he is authorized to verify the foregoing Petition for Review; that he has read the said Petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

/s/ JOHN T. RILEY [22]

Subscribed and Sworn to before me this 21st day of December, 1944.

[Seal] /s/ LYDIA CONRAD

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 8th, 1948.

Personal service of the copy of the within Petition is hereby admitted this 3rd day of January, 1945.

/s/ J. P. WENCHEL, (CAR)

Chief Counsel Bureau of Internal Revenue Counsel for Respondent

Endorsed]: T.C.U.S. Filed Jan. 5, 1945. [23]

[Title of Tax Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit with reference to Petition for refund heretofore filed by the Petitioner in the above cause, a transcript of the record of the above cause, prepared and transmitted as required by law and by the rules of said court and to include in said transcript of record, the following documents or certified copies, to wit:

(1) The docket entries of all proceedings before The Tax Court of the United States.

(2) Pleadings before The Tax Court of the United States, as follows:

(a) Petition for redetermination including Exhibits.

(b) Answer of the Respondent.

(3) The findings of fact and opinion of The Tax Court of the United States.

(4) The decision of The Tax Court of the United States. [24]

(5) The Petition for Review filed by the Petitioner in the above cause.

(6) This Praecipe.

JOHN T. RILEY and

DARIUS F. JOHNSON

By /s/ JOHN T. RILEY.

Counsel for Petitioner, 427

Title Insurance Bldg.,

Los Angeles 13, California.

Personal service of a copy of the within Praecipe is hereby admitted this 3rd day of January, 1945.

/s/ J. P. WENCHEL, (CAR)

Chief Counsel, Bureau of Internal Revenue Counsel for Respondent

[Endorsed]: T. C. U. S. Filed Jan. 5, 1945.

[25]

[Title of Tax Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 25, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 19th day of January, 1945.

[Seal]

B. D. GAMBLE

Clerk, The Tax Court of the United States.

[Endorsed]: No. 10983. United States Circuit Court of Appeals For the Ninth Circuit. Susan Avery Jones, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed February 12, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 10983

The Tax Court of the United States

No. 676

SUSAN AVERY JONES,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON AP-
PEAL AND APPELLANTS DESIGNATION
OF THE MATERIAL PORTIONS OF THE
RECORD ON APPEAL WHICH ARE
THEREFORE TO BE PRINTED

I.

Pursuant to the provisions of Rule 19, subdivision

6 of the Rules of the Circuit Court of Appeals for the Ninth Circuit, Appellant adopts the assignments of error included in the Petition for Review as the points upon which she intends to rely on appeal.

II.

Pursuant to the above Rule, Appellant hereby designates for printing the entire transcript of the proceedings before The Tax Court of the United States.

Dated: February 17, 1945.

JOHN T. RILEY and

DARIUS F. JOHNSON

By DARIUS F. JOHNSON

Counsel for Appellant, 433
South Spring Street, Los
Angeles 13, California

[Endorsed]: Filed Feb. 18, 1945. Paul P.
O'Brien, Clerk.

No. 10983.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SUSAN AVERY JONES,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR THE PETITIONER.

JOHN T. RILEY,

DARIUS F. JOHNSON,

433 South Spring Street, Los Angeles 13,

Attorneys for Petitioner.

FILED

APR 16 1945

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vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of The Tax Court of the United States [R. 14] is a memorandum opinion.

Jurisdiction.

This is an appeal from a judgment of The Tax Court of the United States entered October 10, 1943, in the amount of \$4,781.48 [R. 18]. Petition for review was filed January 5, 1945 [R. 23]. The allegation showing the existence of the jurisdiction of The Tax Court of the United States and of this Court are contained in the Petition filed with The Tax Court [R. 3-7] and the Petition for review [R. 19-23].

Question Presented.

Whether or not the taxpayer converted a vacant lot purchased for the purpose of building a personal dwelling thereon into a transaction entered into for profit so as to entitle her to a loss in 1940 upon sale of the property.

Statute.

The applicable statutes and regulations involved will be found in the appendix to this brief, pages 15 to 18.

Statement.

The case was tried to the Court and evidence consisted of the testimony of one witness for Petitioner, together with documentary evidence adduced by both parties.

Petitioner is an individual residing in Los Angeles, California. She filed her income tax return for 1940 with the Collector of Internal Revenue for the Sixth District of California. She is the widow of Grover Jones a highly successful author and scenario writer, who died in September, 1940.

In 1927 Petitioner and her then husband, Grover Jones, entered into a contract for the purchase of certain real estate in Beverly Hills, California, hereinafter referred to as Tiger Tail. The purchase price was \$16,500.00. Payments were completed in May, 1931, and at that time Petitioner and her husband received a deed to this property as joint tenants. The lot was irregularly shaped and at the time of purchase, Petitioner and her husband were advised by the broker that they would have no difficulty in buying an adjoining lot at a low price, which would fill out the tract to form a rectangular piece. Peti-

tioner and her husband purchased this property intending to build a home thereon. When the payments were finally completed and the deed received, Petitioner's husband commenced negotiations for the so-called corner lot which he felt was needed to complete the tract. The owner of this lot was a non-resident and when his price for the property was made known, Jones decided immediately that he would not pay it, but that he would build his home elsewhere. He asked his real estate broker to list Tiger Tail for sale and very soon thereafter purchased a residence on Sunset Boulevard, and occupied it with Petitioner as their home. During the period from June, 1931 to 1937 Petitioner and her husband purchased additional ground for the Sunset Boulevard home and eventually in 1937 razed the original building and erected a palatial mansion with extensive landscaping, elaborate dog kennels, a swimming pool and other improvements found only in the most expensive homes. The total cost was approximately \$250,000.00. Its original cost was not in excess of \$27,500.00.

When the Petitioner and her husband purchased the home on Sunset Boulevard they abandoned any intention to build their future home on Tiger Tail. During 1932 and 1933 they spent large sums of money improving it as a residential site, which included installations of a sprinkler system, a driveway, the building of a road along one side of the property, and other extensive improvements, including the planting of trees and shrubs. This was done in an effort to make the property more salable and to minimize their loss in this connection. No buildings were ever erected and the property never produced any income.

On several occasions Jones was offered \$10,000.00 for Tiger Tail and each time he refused to accept. He had become so enraged over his inability to acquire the small lot needed to complete Tiger Tail that he refused to sell unless he got his money out of it. On several occasions real estate men discussed with Jones the possibility of trades and exchanges for ranches but nothing ever came of these discussions. After Jones' death in September, 1940, Petitioner sold Tiger Tail for \$7,500.00. The value of Tiger Tail in May or June, 1931, when Petitioner and her husband purchased the home on Sunset Boulevard, was \$16,500.00. The money and effort expended by Petitioner and her husband after June, 1931, to promote the sale of Tiger Tail do not constitute a transaction entered into for profit.

In the income tax return filed by the Petitioner herein for the year 1940, there was deducted a loss of \$17,560.00 sustained upon the sale of the Tiger Tail property. The Commissioner of Internal Revenue disallowed said loss and on the 10th day of November, 1942, mailed to Petitioner what is termed a deficiency letter, wherein the Commissioner proposed a deficiency of income tax for the year 1940 in the sum of \$4,781.48. In due course of time, and within the 90-day period, Petitioner filed her appeal with The Tax Court of the United States wherein she alleged that Respondent had erroneously disallowed the loss of \$17,560.00 resulting from the sale of said Tiger Tail property. Thereafter The Tax Court of the United States entered its order determining a deficiency in tax against the Petitioner in the sum of \$4,781.48 [R. 18].

Specification of Error.

I.

The Tax Court of the United States erred in determining a deficiency in tax against the Petitioner for the year 1940, in the sum of \$4,781.48.

II.

The Tax Court of the United States erred in determining that the transaction resulting in a loss of \$9,000.00 to the Petitioner was not a loss sustained in a transaction entered into for profit under *Section 23(c)(2) of the Internal Revenue Code*.

III.

The Tax Court of the United States erred in that the conclusions of law set forth in its opinion are contrary to and not in harmony with the Court's findings of fact.

Summary of Argument.

The Petitioner was entitled to deduct the loss sustained upon the sale of the Tiger Tail property in 1940, for the following reasons:

1. When the Petitioner and her husband purchased other property for their residence in 1931, they abandoned the Tiger Tail property as a site for their personal residence. The expenditure of a large sum of money thereafter to make the property more salable and listing the property for sale constituted a conversion to a transaction entered into for profit.

2. This case does not come under the principle laid down in *Bowers v. Kerbaugh-Empire Company*, 271 U. S. 170, in which the court held that minimizing a loss is not a profit and which is cited by the trial court in the instant case as a reason why the Petitioner's loss is not allowable. While it is true that minimizing a loss is not a profit, it does not follow that the expenditure of money to minimize a loss deprives an individual of the right to deduct a loss sustained upon the sale of property under *Section 23(e)(1) and (2), of the Internal Revenue Code*.

3. *Heiner v. Tindle*, 276 U. S. 582, and later cases involving deductibility of losses sustained on sale of property converted from personal use to transactions entered into for profit, dealt with property which could be rented for dwelling purposes, a fact not possible in the instant case for the reason that there were no buildings on the property.

4. In view of The Tax Court's finding that the Petitioner and her husband had abandoned the Tiger Tail property when they spent large sums of money to improve it and make it more salable, listed it for sale and purchased other property at an ultimate expense of \$250,000.00, it is unreasonable to consider that the transaction was not converted into a transaction for profit.

ARGUMENT.

I and II.

Abandonment of Tiger Tail Property as a Residence Site and Purchase of Other Property for That Purpose and Expenditure of Large Sums of Money on the Tiger Tail Property to Make It More Salable, Constituted Conversion to a Transaction Entered Into for Profit.

There is no dispute on the facts in this case. They are clearly set forth in the findings of fact [R. 12]. The Tax Court found that the Petitioner and her husband abandoned any intention of building their home on the Tiger Tail property when they bought the new property on Sunset Boulevard prior to June, 1931; that during 1932 and 1933 Petitioner and her husband spent large sums of money improving the Tiger Tail property as a residential site which included installation of a sprinkler system, a driveway, building a road along one side of the property and other extensive improvements including planting of trees and shrubs. This was done in the effort of making the property more salable and to minimize their losses in this connection. No buildings were ever erected and the property never produced any income.

Petitioner submits that the expenditure of the money improving the Tiger Tail property after abandoning same as a site for a personal dwelling constituted converting the property into a transaction for profit. This money was spent to make the property more salable and at a greater price than it would have brought had the improvements not been installed. The receipt of more money even though at less than original cost is certainly a gain. The transaction in total may not produce a profit but the receipt of

more money certainly increases net worth and is a transaction for profit within the meaning of the Internal Revenue Code.

The Tax Court states in its opinion that minimizing a loss is not a profit, citing *Bowers v. Kerbaugh-Empire Company*, 271 U. S. 170. In this case a New York corporation prior to July 2, 1913, had borrowed money from the Deutsche Bank of Germany, amounting to \$1,983,000.00. The equivalent in marks was 8,341,337.50. The notes were payable in United States gold coin, or in marks. All of the moneys borrowed by the New York corporation were expended and lost in and about the performance of construction contracts. These losses were sustained in 1913, 1914, 1916, 1917 and 1918 and were allowed as deductions for income tax purposes. The amount of the loss exceeded the amount claimed by the Government to be income in the case. After the United States entered the war, the Deutsche Bank was an alien enemy. In 1921, on the demand of the Alien Property Custodian, the corporation paid in full settlement of the notes, \$113,688.23. The settlement was on the basis of two and one-half cents per mark. Measured by United States gold coin, the difference between the marks borrowed at the time the loan was made and the amount paid to the Alien Property Custodian was \$684,456.18. The Commissioner of Internal Revenue, notwithstanding the claim of the corporation that the amount borrowed had been lost in contract operations and that no income had resulted, held the difference set forth above to be income. The Court in its opinion stated, "The

transaction here in question did not result in gain from capital and labor, or from either of them, or in profit gained through the sale or conversion of capital." The Court thereafter stated "The loss was less than it would have been if marks had not declined in value; but the mere diminution of loss is not gain, profit or income."

It is submitted that there could be no question but what the payment of the debt by the New York corporation to the Alien Property Custodian was in connection with a business transaction and undoubtedly at the time the money was borrowed was in connection with a transaction entered into for profit even though resulting in a loss. The case, while stating minimizing a loss is not a profit, is no authority for a conclusion that the expenditure of money to minimize a loss is not a transaction entered into for profit within the meaning of the Internal Revenue Code.

In *General Counsels Memorandum 22272*, Cumulative Bulletin, No. 1940-2, page 214, the Chief Counsel, Bureau of Internal Revenue, rules that the sub-letting of an apartment by tenant who is required to change his residence to another city, is a "transaction entered into for profit," and that a loss sustained in such a transaction is deductible.

It is obvious that the apartment was sub-let at an amount less than was being paid by the original lessee, nevertheless the Chief Counsel to the Bureau of Internal Revenue interprets the transaction as being one entered into for profit and allows the deduction of the loss after citing *Heiner v. Tindle*, 276 U. S. 582.

In the case of *Heiner v. Tindle, supra*, the leasing of property for a long period of time demonstrates an intention on the part of the owner to convert the property formerly used for residential purposes to a business use and the loss on the sale thereof was allowed. The facts do not indicate whether the rents produced a profit or not, and this fact was not considered by the Court. The Court was dealing with the Revenue Act of 1918. This Act provided that in computing net income there shall be allowed as deductions losses sustained by individuals, if “* * * incurred in any transaction entered into for profit, though not connected with trade or business, * * *.” In dealing with this section the court stated at page 585, “But the words ‘any transaction’ as used in sub-section (a) 5 are not a technical phrase or one of art. They must therefore be taken in their usual sense, and so taken, they are, we think, broad enough to embrace at least any action or business operation, such as that with which we are now concerned, by which property previously acquired is devoted exclusively to the production of taxable income.” The Supreme Court has stated that the words “any transaction” embrace at least any action or business operation.

It would seem unreasonable to hold that the expenditure of large sums of money for the improvement of property would not be within the meaning of the words “any transaction” entered into for profit after the abandonment of the Tiger Tail property as a residential site, which in fact was never occupied as such or used as such by Petitioner.

All of the cases dealing with the disallowance of losses sustained upon the sale of property originally acquired for personal use have dealt with property easily convertible into a business use by renting. In this case the property was unimproved and could not be rented for business purposes. The Petitioner took the only logical and economical course that they could take in improving the property without the expenditure of many thousands of dollars by the erection of buildings for sale or rental purposes. Had Petitioner merely listed the property for sale without any further improvement, the case would undoubtedly be governed by the decisions cited by The Tax Court, however, in view of the admitted improvements, it is submitted that such improvements remove the transaction from a personal one to a transaction entered into for profit.

These improvements installed by Petitioner and her husband would be comparable to remodeling or reconditioning a residence which was stated as one method of converting personal property to business property in the case of *Morgan v. Commissioner*, 76 Fed. (2d) 390. In this case the Court stated, "The owner did not remodel or recondition the house, or do anything that specially devoted it to rental purposes." The Tax Court in its opinion stated that the improvements made by Petitioner and her husband were ordinary and customary for landscaping a tract for residential use.

We could agree with The Tax Court if the property had been improved with a residence, however, we submit that

it is not ordinary and customary to landscape a tract that is not occupied with a residence unless the owner has either an intention of building thereon his personal dwelling or of selling the property for a profit. The Court found that Petitioner had abandoned the property as a residential site, therefore the improvements could have been installed only for the purpose of realizing more money upon the sale thereof, and this fact was found to be true by The Tax Court also. The Court also states in its opinion that Petitioner and her husband could have at any time erected a home on Tiger Tail and had the benefits of the expenditures. The Court found as a fact that Petitioner and her husband expended approximately \$250,000.00 upon their Sunset Boulevard home. It is contrary to good reason to assume that Petitioner and her husband would expend approximately \$250,000.00 upon their Sunset Boulevard home and return to the Tiger Tail property after abandonment of same. This fact could be stated in any of the cases wherein the taxpayer had converted his residential property to business use by renting same for a period of years and later selling same at a loss which has been allowed by the Courts. All of these taxpayers could, had they so elected, undoubtedly have repurchased property they sold.

It is submitted that the Petitioner did convert the Tiger Tail property into a transaction entered into for profit and any loss sustained upon the sale thereof is allowable as a deduction in computing her net income.

III.

The Board's Conclusion Is Not Supported by Its Findings of Fact.

The Tax Court finds as a fact that Petitioner and her husband purchased the Tiger Tail property for \$16,500.00 for the purpose of erecting a home thereon; that prior to June, 1931, Petitioner and her husband purchased a home on Sunset Boulevard and during the period June, 1931, to 1937, expended approximately \$250,000.00 on this home; that when Petitioner and her husband purchased a home on Sunset Boulevard they abandoned any intention of building their future home on Tiger Tail.

That during 1932 and 1933, they spent large sums of money improving Tiger Tail as a residential site for the purpose of making the property more salable.

The Tax Court then concludes that the money and effort expended by Petitioner and her husband after June, 1931, to promote the sale of Tiger Tail do not constitute a transaction entered into for profit. Petitioner submits that the conclusion of The Tax Court is in error; that the facts found support the conclusion that the money and effort expended by Petitioner and her husband after abandonment of the Tiger Tail property as a home site did convert the property into an investment property and that the sale thereof was in connection with a transaction entered into for profit.

In view of the foregoing, it is respectfully submitted that the Board's opinion and decision based upon its findings of fact are contrary to law.

Conclusion.

In conclusion, it is respectfully submitted that Petitioner during the year 1940 made a sale of Tiger Tail property that was in connection with a transaction entered into for profit and any loss sustained represents a proper deduction in computing her income tax liability. The decision of The Tax Court should therefore be reversed.

Respectfully submitted,

JOHN T. RILEY,

DARIUS F. JOHNSON,

Attorneys for Petitioner.

APPENDIX.

Statutes.

INTERNAL REVENUE CODE:

Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

(e) LOSSES BY INDIVIDUALS.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business.

TREASURY REGULATIONS 103:

Sec. 19.23(e)-1. LOSSES BY INDIVIDUALS.—Losses sustained by individual citizens or residents of the United States and not compensated for by insurance or otherwise are fully deductible if (a) incurred in the taxpayer's trade or business, or (b) incurred in any transaction entered into for profit, or (c) arising from fires, storms, shipwreck, or other casualty, or theft, and a deduction therefor has not prior to the filing of the return been claimed for estate tax purposes in the estate tax return, or (d) if not prohibited or limited by any of the following sections of the Internal Revenue Code: Sections 23(g) and 117, relating to capital losses; section 23(h), relating to wagering losses; section 24(b), relating to losses from sales or exchanges of property between persons designated therein; section 112, relating to recognition of gain or loss upon sales or exchanges of property; section 118, relating to

losses on wash sales of stock or securities; section 251, relating to income from sources within possessions of the United States; and section 252, relating to citizens of possessions of the United States. See section 213 as to limitation upon losses sustained by nonresident aliens.

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. Full consideration must be given to any salvage value and to any insurance or other compensation received in determining the amount of losses actually sustained. See section 113(b).

A loss occasioned by damage to an automobile maintained for pleasure, where such damage results from the faulty driving of the taxpayer or other person operating the automobile, but is not due to the willful act or negligence of the taxpayer, is a deductible loss in the computation of net income. If damage to a taxpayer's automobile results from the faulty driving of the operator of an automobile with which the automobile of the taxpayer collides, the loss occasioned to the taxpayer by such damage is likewise deductible.

No loss is realized by the transfer of property by gift or by death. But see section 44(d).

A loss on the sale of residential property purchased or constructed by the taxpayer for use as his personal residence and so used by him up to the time of the sale is not deductible. If, however, property so purchased or constructed is prior to its sale rented or otherwise appropriated to income-producing purposes and is used for such

purposes up to the time of its sale, a loss from the sale of the property, computed as provided in section 111, is, subject to the limitations provided in section 117, an allowable deduction in an amount not to exceed the excess of the value of the property at the time it was appropriated to income-producing purposes (with proper adjustment for depreciation) over the amount realized from the sale.

Example (1): Residential property was purchased by a taxpayer in 1929 for use as his personal residence at a cost of \$25,000, of which \$15,000 was allocable to the building. The property was so used by the taxpayer until January 1, 1936. From that date to January 1, 1939, when the property was sold, it was rented by the taxpayer. The fair market value of the property at the time it was rented on January 1, 1936, was \$22,000, of which \$12,000 was allocable to the building. The building had an estimated life of 20 years on January 1, 1936. The property was sold on January 1, 1939, for \$16,000. The loss from the sale allowable as a deduction, except as limited by section 117, is \$4,200, computed as follows:

Cost of property in 1929.....	\$25,000
Less depreciation allowed (not less than amount allowable) in respect of the building (depreciation for 3 years at 5 per cent based on \$12,000, value of building when converted to business use)	1,800
	<hr/>
	\$23,200
Selling price of property.....	16,000
	<hr/>
Loss computed as provided in section 111.....	\$ 7,200
	<hr/> <hr/>

Value of property at time it was rented on January 1, 1936	\$22,000
--	----------

Less proper adjustment for depreciation.....	1,800
--	-------

\$20,200

Selling price of property	16,000
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Portion of \$7,200 loss which is deductible except as limited by section 117	\$ 4,200
--	----------

Example (2): If, under the circumstances set forth in example (1), the property had been purchased at a cost of \$20,000, of which \$10,000 was allocable to the building, but otherwise the facts assumed are the same, the deductible loss, except as limited by section 117, is \$2,500, computed as follows:

Cost of property in 1929.....	\$20,000
-------------------------------	----------

Less depreciation allowed (not less than amount allowable) in respect of the building (depreciation for 3 years at 5 percent based on \$10,000, cost of building).....	1,500
--	-------

\$18,500

Selling price of property.....	16,000
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Loss computed as provided in section 111.....	\$ 2,500
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Deductible loss, except as limited by section 117....	2,500
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Losses from the sale or other disposition of Treasury bills issued after June 17, 1930, are not deductible.

No. 10983

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

SUSAN AVERY JONES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,

Assistant Attorney General.

SEWALL KEY,

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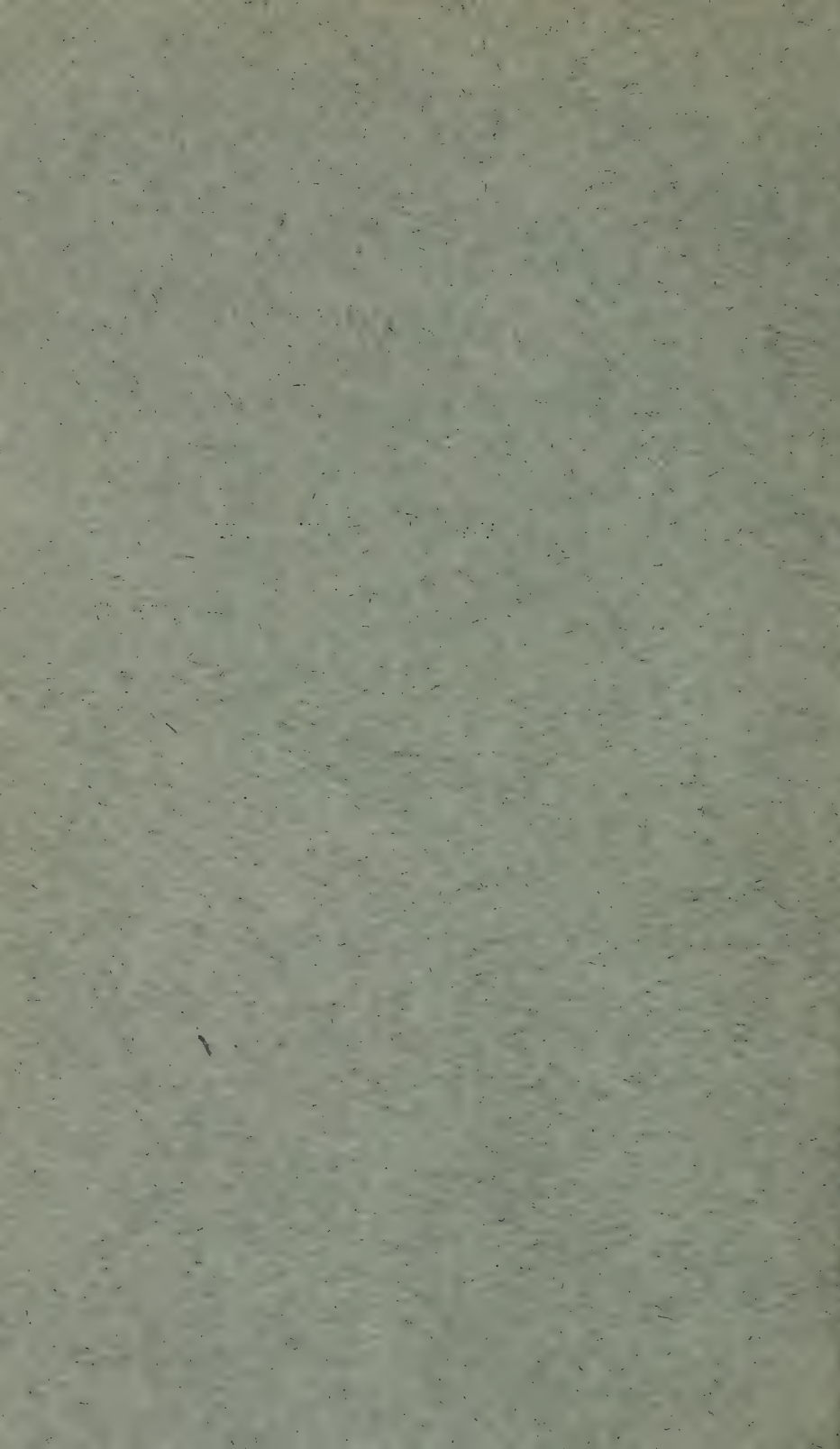
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FILED

MAY 11 1945

PAUL P. O'BRIEN,
CLERK



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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10983

SUSAN AVERY JONES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court of the United States (R. 12-18) is not reported.

JURISDICTION

This case involves the income tax liability of Susan Avery Jones for the calendar year 1940. The notice of deficiency was mailed on November 10, 1942 (R. 6), and the petition for redetermination was filed with the Tax Court on February 2, 1943 (R. 1), pursuant to Section 272 (a) of the Internal Revenue Code. The decision of the Tax Court was entered on October 10, 1944. (R. 18.) The petition for review was filed on January 5, 1945. (R. 19-23.) The jurisdiction of

this Court rests upon Sections 1141-1142 of the Internal Revenue Code.

QUESTION PRESENTED

Taxpayer and her husband purchased certain real estate for purposes of building a personal dwelling house on it. They subsequently abandoned this intention and improved the land as a residential site in order to facilitate its sale and to minimize any loss thereon. Was the loss sustained upon the sale of the real estate in 1940 deductible under Section 23 (e) (2) of the Internal Revenue Code?

STATUTE AND REGULATIONS INVOLVED

These will be found in the appendix, *infra*.

STATEMENT

The facts as found by the Tax Court may be summarized as follows (R. 12-14):

In 1927, taxpayer and her husband, a highly successful author and scenario writer, entered into a contract for the purchase of certain real estate in Beverly Hills, California, hereinafter referred to as Tiger Tail. The purchase price was \$16,500. Payments were completed in May 1931 and at that time taxpayer and her husband received a deed to this property as joint tenants. The lot was irregularly shaped and at the time of purchase, taxpayer and her husband were advised by the broker that they would have no difficulty in buying an adjoining lot at a low price, which would fill out the tract to form a rectangular piece. Taxpayer and her husband pur-

chased this property intending to build a home thereon. When the payments were finally completed and the deed received, taxpayer's husband commenced negotiations for the so-called corner lot which he felt was needed to complete the tract. The owner of this lot was a non-resident and when his price for the property was made known, Jones decided immediately that he would not pay it, but that he would build his home elsewhere. He asked his real estate broker to list Tiger Tail for sale and very soon thereafter purchased a residence on Sunset Boulevard, and occupied it with taxpayer as their home. During the period from June 1931 to 1937 taxpayer and her husband purchased additional ground for the Sunset Boulevard home and eventually in 1937 razed the original building and erected a palatial mansion with extensive landscaping, elaborate dog kennels, a swimming pool and other improvements found only in the most expensive homes. The total cost was approximately \$250,000. Its original cost was not in excess of \$27,500. (R. 12-13.)

When taxpayer and her husband purchased the home on Sunset Boulevard they abandoned any intention to build their future home on Tiger Tail. During 1932 and 1933 they spent large sums of money improving it as a residential site, which included installations of a sprinkler system, a driveway, the building of a road along one side of the property, and other extensive improvements, including the planting of trees and shrubs. This was done in an effort to make the property more salable and to minimize their

loss in this connection. No buildings were ever erected and the property never produced any income. (R. 13-14.)

On several occasions Jones was offered \$10,000 for Tiger Tail and each time he refused to accept. He had become so enraged over his inability to acquire the small lot needed to complete Tiger Tail that he refused to sell unless he got his money out of it. On several occasions real estate men discussed with Jones the possibility of trades and exchanges for ranches but nothing ever came of these discussions. After Jones' death in September 1940 taxpayer sold Tiger Tail for \$7,500. The value of Tiger Tail in May or June, 1931, when taxpayer and her husband purchased the home on Sunset Boulevard, was \$16,500. (R. 14.)

The Tax Court held that neither the listing of the property for sale nor the expenditure of money and effort to promote its sale constituted a transaction entered into for profit for purposes of deducting the loss sustained under Section 23 (e) (2) of the Internal Revenue Code. (R. 14.) From this decision taxpayer appeals.

SUMMARY OF ARGUMENT

A loss on the sale of residential property purchased for use as the taxpayer's personal residence is not deductible. Although the loss is allowable where the property has previously been devoted exclusively to the production of taxable income, as where it is rented, improvements made for the express purpose of facilitating the sale and minimizing any loss thereon do not convert the transaction into one entered into

for profit. These words must be taken in their usual sense, and activities designed to minimize the loss of money are sufficiently dissimilar from those directed toward the making of profits to warrant the exclusion by the Tax Court of the former from a deduction section of the statute. Insofar as the Treasury Regulations have consistently provided that the residential property must be appropriated to income producing purposes before a transaction entered into for profit is effected, they are a correct and reasonable construction of the statute and have the force and effect of law. Under taxpayer's theory, every sale of a personal asset which involves the expenditure of money in preparation thereof, would be converted into a transaction entered into for profit and the distinction in the statute between personal and profit transactions would be obliterated. Moreover, even assuming that remodeling the land to devote it exclusively to rental or income producing purposes would constitute a conversion without income actually being produced, nothing taxpayer and her husband did to the property was unequivocally inconsistent with their use of the land for residential purposes or made it impossible for them to use it for any definite period of time. At any time after the improvements were made taxpayer and her husband could have erected their home on the land and have had the benefit of their expenditures. Under any analysis, therefore, taxpayer was correctly denied the deduction on the ground the loss on the sale of the property in 1940 was not incurred in a transaction entered into for profit.

ARGUMENT

The loss on the sale of the Tiger Tail property in 1940 was not incurred in a transaction entered into for profit

The issue in this case is a narrow one. Taxpayer and her husband admittedly purchased the Tiger Tail property in order to build their personal home on it. (R. 13.) It is conceded (Pet. Br. 11) that after they abandoned this intention, had they then merely listed the property with a broker for sale, the loss on the subsequent sale would have been a personal one (*Phipps v. Helvering*, 124 F. 2d 292 (App. D. C.)), and not deductible under Section 23 (e) (2) of the Internal Revenue Code (Appendix, *infra*) as one incurred in a transaction entered into for profit (*Morgan v. Commissioner*, 76 F. 2d 390 (C. C. A. 5th), certiorari denied, 296 U. S. 601; *Rumsey v. Commissioner*, 82 F. 2d 158 (C. C. A. 2d), certiorari denied, 299 U. S. 552; *Gevirtz v. Commissioner*, 123 F. 2d 707 (C. C. A. 2d); *Robinson v. Commissioner*, 134 F. 2d 168 (C. C. A. 3d)). The factor alleged to remove the instant case from the pale of the foregoing authorities is the expenditure of considerable sums of money to improve the property as a residential site. (Pet. Br. 11.) It is the Government's contention, however, that where, as here, the improvements were made for the express purpose of facilitating the sale of the land and minimizing any loss thereon (R. 13-14) and did not change the use to which the property could be put, they did not effect a conversion of the transaction into one entered into for profit.

At the outset it should be noted that appellate review of this issue is definitely restricted. Whether

a transaction is entered into for profit is fundamentally a question of intention, and the finding of the Tax Court against taxpayer is entitled to the finality indicated by *Dobson v. Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231. See *Cohen v. Commissioner* (C. C. A. 2d), decided March 23, 1945 (1945 C. C. H. par. 9240). The words "any transaction entered into for profit" are not a technical phrase or one of art. *Heiner v. Tindle*, 276 U. S. 582. They must therefore be taken in their usual sense (*Heiner v. Tindle*) and when so taken, it is clear that activities designed to minimize the loss of money are decidedly different from those directed towards the making of profits. See *Bowers v. Kerbaugh-Empire Co.*, 271 U. S. 170. They may not be the antithesis of each other, but surely the Tax Court cannot be convicted of a "clear cut" error of law in holding them sufficiently dissimilar to warrant exclusion of the former from the purview of a deduction section of the statute. See *New Colonial Ice Co. v. Helvering*, 292 U. S. 435; *Robinson v. Commissioner*, *supra*.

Moreover it is submitted that the rationale of Section 23 (e) (2) of the Internal Revenue Code as construed by the courts leads inescapably to the conclusion that taxpayer was correctly denied the deduction sought. A loss on the sale of residential property purchased for use as the taxpayer's personal residence is not deductible. *Phipps v. Helvering*, *supra*; Section 19.23 (e)-1, Treasury Regulations 103, Appendix, *infra*. A change of character of the property by devoting it exclusively to the production of taxable income, as where the property is rented, converts the

loss on the subsequent sale, however, to an allowable deduction. *Heiner v. Tindle, supra*. Insofar as the Treasury Regulations, from Article 171 of Treasury Regulations 75 to the present (see Section 19.23 (e)-1 of the Treasury Regulations 103), have consistently followed the pronouncement of the *Tindle* case that the property must be "appropriated to income producing purposes", they are a correct and reasonable construction of the statute and have the force and effect of law. *Helvering v. Winmill*, 305 U. S. 79; *Helvering v. Reynolds*, 306 U. S. 110. Yet under taxpayer's theory, almost every sale of a personal asset which had never been appropriated to income producing purposes, would be converted into a transaction entered into for profit. For almost every sale necessitates some preparation involving the expenditure of money. Thus, if in order to sell his home an owner has a title search made, or the roof repaired, or prior to selling his personal automobile, has the fenders straightened or body painted, taxpayer would have to say that both the house and automobile were sold in a transaction entered into for profit; whereas in truth, all that the owner wanted, after he finished his personal use of the house and automobile was to realize from the sale as much money as possible. But this is true of every sale and the distinction in the statute between personal and profit transactions would be obliterated. In *Weir v. Commissioner*, 109 F. 2d 996, the Third Circuit stated the issue in this manner (p. 998):

If you intend to benefit us by producing taxable profits, you may take your loss, but if you

don't intend to so benefit us, you cannot deduct your losses and we, furthermore will tax you on your windfalls. * * *

The emphasis upon the production of taxable income was not haphazard. If a personal residence is rented out, the Government has the opportunity of taxing the net income, and as compensation for the opportunity allows a loss deduction on the sale. But the loss is not allowed when there is merely an attempt to rent the premises no matter how sincere or vigorous. *Rumsey v. Commissioner, supra*; *Gevirtz v. Commissioner, supra*; *Phipps v. Helvering, supra*. This is so not only because of the absence of the income producing feature, but also because of the ease with which the owner may resume his original use. *Schmidlapp v. Commissioner*, 96 F. 2d 680 (C. C. A. 2d). Nothing taxpayer and her husband did to the Tiger Tail property in 1932 and 1933, when the alleged conversion took place (Pet. Br. 7), was unequivocally inconsistent with their use of the land for residential purposes for any definite period of time. (R. 13, 17.) They may have abandoned the idea of settling there in 1931, but just as the taxpayers in the *Morgan* and *Rumsey* cases, *supra*, they might have resumed their residential uses at any time by a mere change of mind. Assuming, *arguendo*, that remodeling the land to devote it exclusively to rental or income producing purposes would constitute a conversion without income actually being produced (see *Morgan v. Commissioner, supra*; *Rumsey v. Commissioner, supra*), it is clear that here, as the Tax Court pointed out (R. 17), taxpayer and her husband at any time after the improve-

ments were made could have erected their home on Tiger Tail and have had the benefit of their expenditures. It was not until 1937 that the palatial mansion on Sunset Boulevard was built. (R. 13.) Between 1933 and 1937, had taxpayer's husband been able to purchase the lot adjoining the Tiger Tail property at a figure suitable to him, nothing restricted him from making his home there. And the building of the new home in 1937 without doing anything to the Tiger Tail property could not effect a conversion of the latter. *Phipps v. Helvering, supra*. Under any analysis, therefore, taxpayer was correctly denied the deduction on the sale of the property in 1940.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,
LEONARD SARNER,

Special Assistants to the Attorney General.

MAY 1945.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(e) *Losses by Individuals*.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

* * * *

(26 U. S. C. 1940 ed., Sec. 23.)

Treasury regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.23 (e)-1. *Losses by individuals*.—* * *

* * * *

A loss on the sale of residential property purchased or constructed by the taxpayer for use as his personal residence and so used by him up to the time of the sale is not deductible. If, however, property so purchased or constructed is prior to its sale rented or otherwise appropriated to income-producing purposes and is used for such purposes up to the time of its sale, a loss from the sale of the property, computed as provided in section 111, is, subject to the limitations provided in section 117, an allowable deduction in an amount not to exceed the excess of the value of the property at the time it was appropriated to income-producing purposes (with proper adjustment for depreciation) over the amount realized from the sale.

Example (1): Residential property was purchased by a taxpayer in 1929 for use as his per-

sonal residence at a cost of \$25,000, of which \$15,000 was allocable to the building. The property was so used by the taxpayer until January 1, 1936. From that date to January 1, 1939, when the property was sold, it was rented by the taxpayer. The fair market value of the property at the time it was rented on January 1, 1936, was \$22,000, of which \$12,000 was allocable to the building. The building had an estimated life of 20 years on January 1, 1936. The property was sold on January 1, 1939, for \$16,000. The loss from the sale allowable as a deduction, except as limited by section 117, is \$4,200, computed as follows:

Cost of property in 1929-----	\$25, 000
Less depreciation allowed (not less than amount allowable) in respect of the building (depreciation for 3 years at 5 percent based on \$12,000, value of building when converted to business use)-----	1, 800
	<hr/> 23, 200
Selling price of property-----	16, 000
	<hr/>
Loss computed as provided in section 111-----	7, 200
	<hr/>
Value of property at time it was rented on January 1, 1936--	22, 000
Less proper adjustment for depreciation-----	1, 800
	<hr/>
	20, 200
Selling price of property-----	16, 000
	<hr/>
Portion of \$7,200 loss which is deductible except as limited by section 117-----	4, 200

Example (2): If, under the circumstances set forth in example (1), the property had been purchased at a cost of \$20,000, of which \$10,000 was allocable to the building, but otherwise the facts assumed are the same, the deductible loss, except as limited by section 117, is \$2,500, computed as follows:

Cost of property in 1929-----	\$20, 000
Less depreciation allowed (not less than amount allowable) in respect of the building (depreciation for 3 years at 5 percent based on \$10,000, cost of building)-----	1, 500
	<hr/> 18, 500
Selling price of property-----	16, 000
	<hr/>
Loss computed as provided in section 111-----	2, 500
Deductible loss, except as limited by section 117----	2, 500

* * * * *

No. 10956

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Appellant,

vs.

KINNER MOTORS, INC.,
Appellee.

Transcript of Record

Upon Petition for Enforcement of an Order of the
National Labor Relations Board

FILED

MAR 26 1945

PAUL P. O'BRIEN,
CLERK

No. 10956

United States
Circuit Court of Appeals
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NATIONAL LABOR RELATIONS BOARD,
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Transcript of Record

Upon Petition for Enforcement of an Order of the
National Labor Relations Board

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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BOARD'S EXHIBIT No. 1-A

N.L.R.B. 29

(Revised 8-9-41)

**United States of America
Before the National Labor Relations Board
21st Region**

Case No. 21-C 2307

Date Filed May 15, 1943

In the Matter of

KINNER MOTORS, INC.

and

**INTERNATIONAL ASSOCIATION OF MA-
CHINISTS, DISTRICT LODGE NO. 94, for
and on behalf of Lodge No. 311, AFL.**

CHARGE

Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that Kinner Motors, Inc., at 635 W. Colorado Blvd., Glendale, California, employing 400 workers in manufacture of aircraft motors, has engaged in and is engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (2) of said Act, in that said company, by its officers, agents and employees, formed among its employees at its Glendale, California plant a labor organization known as Kinner Motors Employees Asso-

ciation, Inc., on or about March 15, 1943, and at all times since said date has dominated and interfered with the operation and administration of the said Kinner Motors Employees Association, Inc., and contributed financial and other support thereto, in violation of Section 8, subsection (2) of said Act.

By the acts set forth in the paragraph above and by other acts and statements, it, by its officers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed under Section 7 of the said Act in violation of Section 8, subsection (3) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE No. 94, for and on behalf of LODGE #311, AFL

By: ROSCOE V. ICKES,

Roscoe V. Ickes, Representative, 532 Maple Avenue,
Los Angeles, California. Phone—MUtual 2389.

Subscribed and sworn to before me this 15th day of May, 1943. At Los Angeles, Calif.

QUENTIN OGREN

Quentin Ogren

Field Examiner, National
Labor Relations Board.

BOARD'S EXHIBIT No. 1-B

[Title of Board and Cause.]

Case No. 21-C-2307

Date Filed 12-13-43

COMPLAINT

It having been charged by International Association of Machinists, District Lodge No. 94, for and on behalf of Lodge No. 311, AFL, that Kinner Motors, Inc., hereinafter called the Respondent, has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, approved July 5, 1935, 49 Stat. 449, hereinafter called the Act, the National Labor Relations Board, by the Regional Director for the Twenty-first Region, designated as agent of said Board by its Rules and Regulations—Series 2, as amended, hereby issues its Complaint and alleges the following:

1. Respondent is and at all times herein alleged has been a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business at

635 West Colorado Boulevard, Glendale, California, hereinafter called the plant, where it is engaged in the manufacture of aircraft engine parts and the assembly of aircraft engines.

2. Respondent, in the course and conduct of its business, as set forth in paragraph 1 above, causes and has continuously caused large quantities of materials to be purchased and transported in interstate commerce from and through states of the United States other than the State of California to its plant in the State of California and causes and has continuously caused large quantities of products manufactured at its plant to be sold and transported in interstate commerce into and through states of the United States other than the State of California.

3. (a) International Association of Machinists, District Lodge No. 94, for and on behalf of Lodge No. 311, AFL, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

(b) Kinner Motors Employees Association, Inc., hereinafter called the Association, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

4. Respondent, by its officers, agents, and employees, while engaged at its plant as described in paragraphs 1 and 2 above, did, on or about March 15, 1943, inaugurate, sponsor, promote, and form the Association among its employees and has at all times since that date, up to and including the date of this Complaint, dominated and interfered

with the administration of said Association and contributed financial and other support thereto.

5. Respondent, on or about June 16, 1943, entered into a written agreement with the Association, the terms of which concern wages, rates of pay, hours of employment, and other conditions of employment of Respondent's employees and establish the Association as the exclusive collective bargaining representative of said employees, which agreement by its terms has remained in full force and effect from on or about June 16, 1943, to and including the date of this Complaint.

6. Respondent, by its officers, agents, and employees, while engaged at its plant as described in paragraphs 1 and 2 above, from on or about February 1942 up to and including the date of this Complaint, expressed to employees its opposition to any labor organization except an employer-dominated organization, solicited and advised employees to join the Association, and attempted by means of threats to persuade employees to join the Association.

7. Respondent, by its acts and each of them, as set forth in paragraphs 4 and 5 above, did dominate and interfere with the formation and administration of a labor organization, to-wit, the Association, and did contribute financial and other support thereto, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (2) of the Act. Further, the agreement described in paragraph 5 above, is invalid, void, and illegal.

8. Respondent, by its acts and each of them, as

set forth in paragraphs 4, 5, and 6 above, did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

9. The aforesaid acts of Respondent, as set forth and described in paragraphs 4, 5, and 6 above, constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (2) and Section 2, subsections (6) and (7) of the Act.

10. The aforesaid acts of Respondent, as set forth in paragraphs 4, 5, and 6 above, occurring in connection with the operations of Respondent, described in paragraphs 1 and 2 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Wherefore, the National Labor Relations Board on the 26th day of November, 1943, issues its com-

plaint against Kinner Motors, Inc., Respondent herein.

(Seal)

ELWYN J. EAGEN

Elwyn J. Eagen, Regional Director, National Labor Relations Board, Twenty-first Region, 111 West Seventh Street, Los Angeles, California.

BOARD'S EXHIBIT No. 1-C

Case No. 2-C-2307

Date 12-13-43

[Title of Board and Cause.]

NOTICE OF HEARING

Please Take Notice that on the 6th day of December at 10:00 A.M. 1943 on the Ninth Floor of the Board of Trade Building, 111 West Seventh Street, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the Regional Director for the 21st Region, with offices at 111 West Seventh St., Los Angeles, California, acting in this matter as agent of the National Labor Relations Board an answer

to the said Complaint, within ten (10) days from the service thereof.

Please Take Notice that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

In Witness Whereof the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Regional Director for the 21st Region on this 26th day of November, 1943.

(Seal)

ELWYN J. EAGEN

Elwyn J. Eagen, Regional Director. National Labor Relations Board.

BOARD'S EXHIBIT No. 1-J

Case No. 21-C-2307

Date 12-13-43

[Title of Board and Cause.]

ANSWER OF KINNER MOTORS, INC.

Comes Now the Respondent, Kinner Motors, Inc., and answering the complaint on file herein, denies and alleges as follows:

1. Admits all of the allegations of Paragraphs 1, 2 and 3 of the complaint.
2. Denies that the respondent, by its officers,

agents and/or employees, while engaged at its plant as described in Paragraphs 1 and 2 of the complaint did, on or about March 15, 1943, or at any other time or at all, inaugurate, sponsor, permit and/or form the Association among its employees, and denies that it has at all times since that date up to and including the date of this complaint, dominated and/or interfered with the administration of said Association and/or contributed financial and/or other support thereto.

2a. Admits the allegations of Paragraph 5.

3. Answering Paragraph 6 this Respondent denies that it, by its officers, agents and/or employees, while engaged at its plant as described in Paragraphs 1 and 2 of the complaint, from on or about February, 1942, up to and including the date of this complaint, or at any other time or at all, expressed to its employees its opposition to any labor organization, except an employer-dominated organization, solicited and/or advised employees to join the Association and/or attempted, by means of threats, to persuade employees to join the Association.

4. Answering Paragraph 7 this Respondent denies that it, by its acts and/or each of them, as set forth in Paragraphs 4 and 5 of the complaint, did dominate and/or interfere with the formation and administration of a labor organization to wit: the Association, and denies that it did contribute financially and/or otherwise thereto, and denies that it did thereby, or in any other manner, engage in and/or is thereby engaging in, unfair

labor practices within the meaning of Section 8, subsection 2 of the Act or within the meaning of any other section of the Act, and denies that the agreement described in Paragraph 5 of the complaint is invalid, void and/or illegal.

5. Denies that Respondent, by its acts and each of them, as set forth in Paragraph 4 and 5 and 6 of the complaint, or by any other acts, did interfere with, restrain and/or coerce and/or is interfering with, restraining and/or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act or any other section of the Act, and denies that it did thereby engage in and/or is hereby engaging in unfair labor practices within the meaning of Section 8, subsection 1 of the Act, or any other section or subsection of said Act.

6. Denies that the aforesaid alleged acts of Respondents, as set forth and described in Paragraphs 4, 5 and 6 of the complaint, constitute unfair labor practices, affecting commerce within the meaning of Section 8, subsection 1 and/or 2 and Section 2, subsections 6 and 7, or any other section or subsection of the Act.

7. Answering Paragraph 9, Respondent denies that the aforesaid acts of Respondent, as set forth in Paragraphs 4, 5 and 6 of the complaint occurring in connection with the operations of the Respondent described in Paragraphs 1 and 2 of the complaint have a close, intimate and/or substantial relation to trade, traffic and/or commerce among the several states and tend to lead to labor disputes

burdening and obstructing commerce and the free flow of commerce.

Wherefore, Respondent prays that said complaint be dismissed.

VICTOR FORD COLLINS

Victor Ford Collins

Attorney for Respondent

State of California,

County of Los Angeles—ss.

Victor Semrau, being by me first duly sworn depose and says: That he is the Secretary of Kinner Motors, Inc., that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

VICTOR SEMRAU

VICTOR E. SEMRAU

(Victor Semrau)

Subscribed and sworn to before me this 30th day of November, 1943.

(Seal)

ELIZABETH L. KUHNS

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Feb. 14, 1946

BOARD'S EXHIBIT NO. 2

Case No. 21-C-2307

Date 12-13-43

[Title of Board and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between Kinner Motors, Inc., by its undersigned representative, and Daniel J. Harrington, Attorney for the National Labor Relations Board, as follows:

1. That Kinner Motors, Inc. is a California corporation having its principal office and place of business at Glendale, California, where it owns and operates a plant for the manufacture of aircraft engine parts and the assembly of aircraft engines.

2. That Kinner Motors, Inc., in the course and conduct of its business during the period from January 1, 1943 to November 3, 1943, purchased raw materials amounting to approximately \$6,-162,648 in value, approximately \$2,930,169 thereof being transported to its Glendale plant from points outside the State of California.

3. That Kinner Motors, Inc., in the course and conduct of its business during the period from January 1, 1943, to November 3, 1943, sold products amounting to \$3,054,314 in value, of which amount sales approximating \$458,157 were made for delivery outside the State of California.

4. That Kinner Motors, Inc. is engaged in interstate commerce within the meaning of the National

Labor Relations Act and the decisions of the United States Supreme Court thereunder.

KINNER MOTORS, INC.

(By) VICTOR FORD COLLINS

DANIEL J. HARRINGTON

Daniel J. Harrington, Attorney
National Labor Relations Board.

United States of America

Before the National Labor Relations Board

Case No. 21-C-2307

In the Matter of

KINNER MOTORS, INC.

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS, DISTRICT LODGE NO. 94
for and on behalf of LODGE NO. 311, A.F.L.

DECISION AND ORDER

On January 25, 1944, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report annexed hereto. Thereafter, the respondent and the Asso-

ciation filed exceptions to the Intermediate Report and a joint brief in support of the exceptions. Oral argument, in which the respondent and the Union participated, was held before the Board in Washington, D. C. on May 16, 1944.

The Board has considered the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions.¹

Shortly after the respondent's employees had commenced to organize through the Union, the Association was formed by three leadmen² in response to an address on forming an inside union, delivered at the plant by Walker³ with the knowledge and

¹ The respondent has contended that the Board is barred from proceeding in this case by a limitation on the use of its funds contained in Labor-Federal Security Appropriations Act, 1944, 57 Stat. 494. This contention may no longer be urged because that Appropriations Act has expired.

² We agree with the Trial Examiner's finding that, regardless of the supervisory status of leadmen, their activities on behalf of the Association are imputable to the respondent because it is apparent from the record that they were acting with the support and approval of management.

³ Walker regularly took the place of Foreman Johnson one night each week and was characterized by Johnson as "top man" in the department on those occasions. We find that the conduct of Walker in urging the employees to form an inside

consent of Foreman Johnson. Thereafter, numerous leadmen, Foreman Johnson, and other supervisory employees openly distributed membership cards and solicited signatures at the plant during working hours, urging the employees to join the Association. Among the early officers of the Association were Christine Jagoe and Rose Minor, both employed as confidential secretaries to Personnel Director Sullivan in the respondent's personnel office, where all hiring, transfers, promotions, and discharges were cleared.⁴ Despite the

organization is imputable to the respondent (1) because the speech was made with the knowledge and permission of Foreman Johnson and (2) because the employees could reasonably regard Walker as a spokesman for management.

⁴Jagoe interviewed applicants for employment; filled out the application forms; and was at times called up by Personnel Director Sullivan to give her opinion upon an applicant's suitability for a specific job. Upon being employed, the applicant was supplied by Jagoe with various pamphlets, work cards, and other literature incidental to his work. Minor was in charge of employee insurance and personnel records, to which Jagoe also had access. Both had limited authority to sign Personnel Director Sullivan's name to correspondence.

Because of the active participation in the affairs of the Association, particularly during the critical formative stage, of these two confidential employees who were in close touch with management, the employees could reasonably believe that the Association had the support and backing of management. We find that the respondent is responsible for the activities of Jagoe and Minor on behalf of the Association. *N.L.R.B. v. Southern Bell Telephone Company*, 319 U.S. 50; *International Association of Machinists v. N.L.R.B.*, 311 U.S. 72.

adoption of by-laws which made these two employees ineligible for membership, Minor continued as secretary-treasurer of the Association and attended one of the bargaining conferences as an Association representative. Stevens also continued as president of the Association long after his promotion to a supervisory position in charge of the receiving department.

Within 2 months of the Association's first general meeting, the respondent granted it an exclusive recognition contract which, among other things, required the respondent to print and distribute copies of the contract to all employees. The respondent, however, went much further. At the request of the Association's president, the respondent bound within the covers of each contract detachable membership application and dues check-off authorization cards. The contracts with these inclusions were then distributed by the respondent to all employees, both members and non-members of the Association. When each new employee received from Jagoe in the personnel director's office material incidental to his employment, such as literature pertaining to a group insurance plan, he was also given a copy of the Association contract containing the membership application and check-off authorization cards. While Jagoe informed the new employee that participation in the group insurance plan was purely voluntary, no such assurance was given with respect to the Association. According to the Association's president, signed membership cards continued to be returned to the Associa-

tion, presumably originating from the contract enclosures.⁵ In view of all the circumstances, we find that the distribution of the contracts containing the above-stated enclosures constituted powerful support to the Association and assisted in obtaining new members and thereby maintaining its claimed majority.

Shortly after the execution of the contract, the Association posted on the bulletin boards of both plants a notice in which it took credit for having negotiated in its contract a bonus for night workers. Although the contract contained no such provision, the respondent took no steps to repudiate the false claim of the Association. However, when, shortly thereafter, rumor credited an affiliated union with having obtained higher wages for the respondent's plant guards, the respondent quickly posted a notice, "correcting misstatements that are being made in the plant with reference to present wage raises" and informing the employees that "no Union or other organization was responsible for these raises."⁶ This disparate treatment of the two

⁵ In this connection, it is significant to note that 156 new employees were hired during the month of October 1943 alone.

⁶ The wage increases for the plant guards were approved by the Regional War Labor Board on July 5, 1943, subsequent to the effective date of the banus for night shift employees. Robert Stevens, Association president, testified without contradiction that the respondent's notice was directed to a rumor or claim that Building Service Employees International Union, AFL, had secured higher wages for the respondent's plant guards.

organizations enhanced the prestige and efficacy of the Association as a bargaining representative in the eyes of the employees and thereby assisted it in maintaining and increasing its membership.

The respondent rendered further support to the Association by permitting the employees on the night shift to elect a steward on the plant premises during working hours and in the presence of Foreman Johnson; by permitting leadman Cadaret to leave his work, without pay deductions, to attend Association meetings; and by Personnel Director Sullivan's advice to the night shift employees, assembled at the plant during working hours, that it would be best for them to join the Association. Further evidence of the Association's subservience to the respondent is the fact that the Association's president, Stevens, felt it necessary to obtain Chief Inspector Williams' permission to have his subordinate, Colburn, serve as secretary-treasurer of the Association. That the Association did not function as an effective collective bargaining agency is apparent from Personnel Director Sullivan's addresses to the employees in November 1943, at which time he in effect disposed of grievances unilaterally.

Like the Trial Examiner, we find that the respondent has dominated and interfered with the formation and administration of the Association and has contributed financial and other support to it, in violation of Section 8 (1) and (2) of the Act.

ORDER

Upon the foregoing findings of fact and the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Kinner Motors, Inc., Glendale, California, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Dominating or interfering with the administration of, or contributing support to, Kinner Motors Employees Association, Inc., and dominating or interfering with the formation or administration of, or contributing support to, any other labor organization of its employees;

(b) Giving effect to its contract of June 16, 1943, with Kinner Motors Employees Association, Inc., or to any revision, renewal, extension, modification, or supplement thereof or to any superseding contract which may now be in effect;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, Lodge No. 311, affiliated with the American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Withdraw all recognition from Kinmer Motors Employees Association, Inc., as the representative of any of its employees for the purposes of collective bargaining with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, and completely disestablish Kinmer Motors Employees Association, Inc., as such representatives;

(b) Post immediately in conspicuous places throughout its plant in Glendale, California, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of this Order; and (2) that it will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 22 day of July
1944.

HARRY A. MILLIS

Chairman

GERARD D. REILLY

Member

JOHN M. HOUSTON

Member

[Seal] NATIONAL LABOR RELA-
TIONS BOARD

[Title of Board and Cause.]

Case No. 21-C-2307

MR. DANIEL J. HARRINGTON,

for the Board.

MR. VICTOR FORD COLLINS and

MR. JAMES S. WOLLACOTT,

both of Los Angeles, Calif., for the respondent.

MESSRS. PEARSON & PROCTOR, by

MR. MARLAN PROCTOR,

of Burbank, Calif., for the Association.

MR. ROSCOE ICKES,

of Los Angeles, Calif., for the Union.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon a charge duly filed on May 15, 1943, by
International Association of Machinists, District
Lodge No. 94, for and on behalf of Lodge No. 311,
affiliated with the American Federation of Labor,

herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Twenty-first Region (Los Angeles, California), issued its complaint on November 26, 1943, against Kinner Motors, Inc., Glendale, California, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (2) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and the charge, with notice of hearing thereon, were duly served upon the respondent, the Union, and upon Kinner Motors Employees Association, Inc., the labor organization alleged in the complaint to be company-dominated, and herein called the Association.

With respect to the unfair labor practices, the complaint alleged, in substance, that from about February 1942, to the date of the issuance of the complaint herein, the respondent has expressed to the employees its opposition to any labor organization except an employer-dominated organization; that on or about March 15, 1943, the respondent inaugurated, sponsored, promoted, and formed the Association among its employees and at all times since that date has: (1) dominated, and interfered with the administration of the Association; (2) contributed financial and other support to it; (3) solicited and advised its employees to join it; and (4) attempted by means of threats to persuade its employees to become members thereof; and that on

or about June 16, 1943, the respondent entered into a written collective bargaining agreement with the Association as the exclusive representative of the employees which agreement was in full force and effect at the time of the issuance of the complaint herein.

On or about December 6, 1943, the respondent filed an answer admitting all the allegations of the complaint pertaining to the existence of the respondent and the nature, character, and extent of the business transacted by it, as well as the allegations that the Union and the Association are labor organizations within the meaning of the Act and that it did, on or about June 16, 1943, enter into a written collective bargaining agreement with the Association as the exclusive representative of its employees. The answer denied, however, all the allegations of the complaint with reference to the engagement by the respondent in any unfair labor practices.

Pursuant to notice, a hearing was held on December 13, 15, 16 and 17, 1943, at Los Angeles, California, before Howard Myers, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. At the opening of the hearing, the Association moved to intervene. The motion was granted without objection. Thereafter the Association filed an answer denying, among others, the allegations of the complaint that the respondent inaugurated, sponsored, promoted, and formed the Association; dominated and interfered with its administration; or gave it financial or other support. The Board,

the respondent, and the Association were represented by counsel. The Union appeared by one of its official representatives. All parties participated in the hearing where full opportunity was afforded them to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues. At the commencement of the hearing, counsel for the respondent moved, in which motion counsel for the Association joined, to dismiss the proceeding on the ground the proceeding was barred by the rider attached to the Federal Security Appropriation Act of 1944, Chapter 221, Public Law 135, 78th Congress.¹ The motion was denied. This motion was again renewed, and each time joined in by counsel for the Association, at the conclusion of the Board's case and at the end of the hearing. The motions were again denied. At the conclusion of the taking of all testimony, the motion of Board's counsel to conform the pleadings to the proof was granted over the objections of the respondent's counsel and the Association's counsel. The motion was made applicable only as to the correction of dates, names, and other minor recitals. Motions by the respondent's counsel and by the Association's counsel to dismiss the entire proceeding for failure of proof were taken under consideration and are now denied. Oral argument, in which counsel for the Board, for the respondent, and for the Association participated, was heard at the con-

¹The rider is commonly referred to as the "rider to 1944 Appropriation Act."

clusion of the taking of the evidence and is a part of the record. The parties were granted leave to file briefs with the undersigned on or before December 22, 1943. A brief has been received from the respondent's counsel.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes, in addition to the above, the following:

FINDINGS OF FACT

1. The business of the respondent

Kinner Motors, Inc., a California corporation, owns and operates two plants at Glendale, California, where it is engaged in the manufacture of aircraft engine parts and the assembly of aircraft engines. From January 1, 1943, to November 3, 1943, the respondent purchased raw materials amounting to approximately \$6,162,648 in value. Of this total, materials valued at about \$2,930,169 were transported to its plant from points outside California. During the same period the respondent sold products amounting to \$3,054,314 in value, of which amount sales approximating \$458,157 in value were made for delivery outside California.

The respondent conceded that it is engaged in commerce within the meaning of the Act.

II. The organizations involved

International Association of Machinists Lodge No. 311 is a labor organization affiliated with the

American Federation of Labor and admits to membership employees of the respondent.²

Kinner Motors Employees Association, Inc., is an unaffiliated labor organization admitting to membership only employees of the respondent.

III. The unfair labor practices

A. The respondent's interference with and domination of the formation of the Association

In the early part of March 1943, the Union started to organize the respondent's employees. Soon after the Union organizing campaign began, R. H. Walker, who had charge of the night shift once each week, obtained permission from Foreman B. C. Johnson to ask the "boys" about forming an inside organization.³ During a lunch period Walker called together all of the employees on his shift and, in Johnson's presence,⁴ told them, according

² The instant proceeding was instituted by Lodge 94 for and on behalf of Lodge 311.

³ At the hearing, Foreman Johnson denied that Walker acted in his stead during the one night each week when he was off duty. When confronted with an affidavit previously signed by himself, however, he finally admitted that, although without the title of foreman, Walker was "top man" during his absence. Walker's testimony is uncontradicted that during the period in question Johnson was absent one day each week, and that on these occasions he was in charge.

⁴ Johnson was not questioned about giving Walker permission. He admitted that the speech was made and that he was present, but stated that when Walker started "some sort of gabble" he went down to the end of the shop, began to operate a

to his own admission, that "the A.F. of L. was handbiling us at the gate," and "that we were going to have some sort of an organization pretty soon, and I thought it would be a good idea if we had one of our own."

Shortly after Walker's speech,⁵ Leadman John Williams, father of Chief Inspector George Williams, consulted with Leadmen Orville Gilbert and Howard Sharrar concerning the organization of an inside union. John Williams conferred with Attorney Marlan Proctor. Acting upon Proctor's advice, John Williams, Gilbert, and Sharrar signed articles on March 22 incorporating the Association.

The three leadmen then had cards printed bearing the following text:

I, the undersigned, hereby designate and appoint Kinner Motors Employees' Association, Inc., as my exclusive bargaining agent under and by virtue of the terms of the National Labor Relations Act.

Williams distributed these cards among other leadmen who, in turn, solicited the signatures of employees throughout the plant during working

noisy machine and did not hear what was said. Whether he heard Walker's speech or not is immaterial, since it is undisputed that after being informed of the nature of the speech he authorized its delivery.

⁵ Walker testified that he delivered his speech 2 or 3 weeks before the Association was "heard of."

hours.⁶ Foreman Johnson and W. J. Kroening, a supervisory employee⁷ also distributed these cards and urged employees to join the Association.⁸ Fore-

⁶This finding is based upon the credible testimony of Leadmen Orrill and Gardiner.

⁷The confused state of the record does not permit a finding as to Kroening's exact classification. According to information read into evidence by Personnel Manager Sullivan, from purported company records, Kroening was hired in 1941 as a test mechanic, was reclassified to sub-foreman in July 1942, reclassified to test operator in January 1943, and reclassified to leadman in August 1943, Sullivan also testified, however, that classifications had been listed correctly in a document which he prepared in September 1943, and this document, in evidence, lists Kroening as a foreman. Kroening testified that while he had been hired as a test mechanic, he had always performed the same duties, and that in August 1943, when obtaining information for the Draft Board, he was told by Test Superintendent Gerber that he was a foreman. The evidence is clear that at the time of his activity on behalf of the Association Kroening had supervisory powers, whatever his title or classification. Personnel records show that from March until August 1943, he had charge of a test crew. Kroening stated that he had up to 10 men under his supervision, that he checked their work, instructed new employees, and that several employees whom he recommended for wage increases received them. The undersigned finds that his position and duties were such that employees reasonably considered his Association activities as having the approval and support of management.

⁸Kroening admitted engaging in this conduct. Johnson denied having either passed out cards or advising employees to join. The undersigned does not accept his denial as true. The finding rests

man Earl H. Friar told employees during smoking periods at the plant that he favored the association, and paid initiation fees into the organization.⁹

The first general meeting of the Association was held April 16, at a public hall, At the request of John Williams and Sharrar, Receiving Clerk R. L. Stevens acted as temporary chairman. At the second meeting held on April 23, Stevens was elected president, and he continued in this office until about a month before the hearing. Although promoted on May 1, being placed in charge of the receiving department, with supervision over three other clerks and a mover, Stevens remained in office as head of the Association. Christine Jagoe, secretary to Personnel Manager Sullivan, acted as secretary at the first Association meeting. Thereafter Rose Minor became secretary of the organization. Miss Minor is also employed in the personnel office, in charge of employee insurance and personnel records.

upon the credible testimony of employee J. M. Davis, who testified that Johnson distributed cards among the employees, saying, "Boys, we've got some thing here." Davis named two other employees who were present at the time. Neither was called as a witness by the respondent.

⁹ At the hearing Friar denied that he was or is a foreman. He admitted, however, that he assists Chief Inspector Williams, assigns his jobs to and "looks after" 8 employees, assumes responsibilities for the department when Williams is away, and recommends pay increases for the men in the department. Furthermore, Friar is classified as a foreman on a list of employees prepared by Personnel Director Sullivan in September 1943, and verified by him at the hearing.

B. The respondent's domination of and interference with administration of the Association

On May 1, Proctor wrote to the respondent, asking that the Association be recognized as the exclusive collective bargaining agent of the employees, and accompanying the request with a number of signed cards, the text of which has been noted above. On May 7, President Herring of the respondent wrote to the Association, stating that the cards had been checked, that the respondent would grant the request for recognition, and that it "would be pleased" to discuss "any matters" with it.

On June 16, the respondent and the Association entered into a collective bargaining agreement for 1 year, by terms of which the respondent recognized the Association as the exclusive bargaining agent for all the employees except certain exclusions. The contract covered wages and working conditions. The respondent, at its own expense, thereafter had copies of the contract printed. Within its covers were bound detachable cards, one an application for membership in the Association, and the other authorizing the respondent to make certain deductions monthly and to pay the deductions to the Association. Copies of the contract were distributed to all employees, and thereafter were given to each new employee at the time of hiring, by the personnel office.

In July the respondent permitted the following notice to be placed on the plant bulletin boards:

Notice to Night Shift Employees

Please be advised that commencing immediately a bonus for night shift employees of five cents an hour will be paid by Kinner Motor Company, Inc., in accordance with the terms of the contract recently executed by and between Kinner Motor Company, Inc., and Kinner Motors Employees Association, Inc.

Please be further advised that this bonus has been approved by the War Labor Board.

KINNER MOTORS EMPLOY-
EES ASSOCIATION, INC.

By ROBT. L. STEVENS,
President

The contract contains no such provision as that referred to in the notice.

During the summer an election was conducted among the employees of the night shift, during working hours and with the knowledge of Foreman Johnson,¹⁰ to select a steward to attend Association meetings. Leadman Cadaret was elected. He thereafter attended Association meetings, which were held during his working hours, without punching out his time cards. There is no evidence that any deduction was ever made for time thus lost from his work. Cadaret testified that he did not ask to be "excused" for such absences. Under the circumstances it is reasonable to infer, and the undersigned finds, that Cadaret was permitted by

¹⁰This finding is based upon Johnson's admission at the hearing.

the respondent to leave his work, without pay deduction, to attend Association meetings.

In September President Stevens of the Association and employee Colburn consulted Chief Inspector Williams and obtained his permission to have Colburn serve as secretary-treasurer of the Association.

In November Sullivan assembled all employees during working hours, on both the day and the night shift, and delivered extemporaneous speeches. Among other things, he urged employees to submit their grievances through the Association and advised them to consult with either their "superiors" or with the Association "officials" in obtaining "official" answers or opinions relating to grievances. At the night shift meeting he also told employees that while he had no right to solicit their membership in the Association, it had been organized for them and he thought it best for them to join.¹¹

C. Conclusions

Upon the entire record, the undersigned is convinced and finds that the Association is the creature

¹¹The findings as to the additional remarks made by Sullivan at the night shift meeting rest upon the credible testimony of employee Davis. As to the other remarks, the findings are based upon a document in evidence which Sullivan described as being the transcription of notes made by his stenographer of his statement to the day shift. No stenographer was present at the night session. He denied having advised employees to join the Association. The undersigned does not accept his denial as true.

of the respondent and was brought into existence and utilized by the respondent to defeat and forestall the organizational efforts of the Union. The contention of the respondent that the Association was the spontaneous result of the organizational desires of its employees is not supported by the record. As noted above, just before the Association was formed, Foreman Johnson permitted his assistant, Walker, to address all employees on the night shift and urge the formation of an inside organization. The Association was thereafter formed. Solicitation of members occurred openly and during working hours. Association cards were distributed by Johnson and Kroening. Foreman Friar joined the organization and told employees that he favored the Association.¹² Nor did the respondent cease to interfere with and give support to the Association after its organization. As found above, Leadman Cadaret was permitted to leave his work on the night shift to attend Association meetings, without pay deduction, Chief Inspector Williams was consulted as to whether or not one of the employees under him could serve as an Association officer, and Sullivan plainly advised employees on

¹² Although the record contains persuasive evidence that leadmen who formally organized and became officers of the Association possessed supervisory powers, the undersigned considers it unnecessary to determine that point here. Whatever their supervisory powers, it is clear that they were acting with the support and approval of management.

the night shift in November, that it would be best for them to join the Association.

The undersigned finds that by the foregoing acts the respondent has dominated and interfered with the formation and administration of the Association and has contributed financial and other support to it, thereby interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the respondent set forth in Section III above, occurring in connection with the respondent as described in Section I above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the respondent has engaged in certain unfair labor practices, it will be recommended that the respondent cease and desist from such conduct and take certain affirmative action which the undersigned finds necessary to effectuate the policies of the Act.

Having found that the respondent dominated and interfered with the formation and administration of the Association and contributed support to it, the undersigned therefore will recommend, in order to effectuate the policies of the Act and to free the respondent's employees from such domination and

interference, and the effects thereof, that the respondent withdraw all recognition from the Association as representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment and completely to disestablish it as such representative.

It has also been found that the agreement of June 16, 1943, entered into by and between the respondent and the Association has been a means whereby the respondent has utilized an employer-dominated labor organization to frustrate self-organization and defeat genuine collective bargaining by its employees. Under these circumstances any continuation, renewal, or modification of this agreement would perpetuate the conditions which have deprived the employees of the rights guaranteed to them by the Act and would render ineffectual other portions of these remedial recommendations. It will therefore be recommended that the respondent cease giving effect to any agreement between it and the Association, or to any modification or extension thereof. Nothing in these recommendations, however, should be taken to require the respondent to vary those wage, hour, and other substantive features of its relations with the employees themselves, if any, which the respondent established in performance of the said agreement as extended, renewed, modified, supplemented or superseded.

Upon the basis of the foregoing findings of fact and upon the entire record in the case the undersigned makes the following:

CONCLUSIONS OF LAW

1. International Association of Machinists, Lodge No. 311, affiliated with the American Federation of Labor, and Kinner Motors Employees Association, Inc., are labor organization within the meaning of Section 2 (5) of the Act.

2. By dominating and interfering with the formation and administration of Kinner Motors Employees Association, Inc., and contributing financial and other support to it, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (2) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends that the respondent, Kinner Motors, Inc., its officers, agents, representatives, and assigns shall:

1. Cease and desist from:

(a) Dominating or interfering with the admin-

istration of Kinner Motors Employees Association, Inc., or with the formation or administration of any other labor organization of its employees, or from contributing financial or other support to Kinner Motors Employees Association, Inc., or to any other labor organization of its employees;

(b) Recognizing Kinner Motors Employees Association, Inc., as the exclusive representative of its employees for the purposes of collective bargaining;

(c) Giving effect to its contract of June 16, 1943, with Kinner Motors Employees Association, Inc., or any revision, renewal, extension, modification, or supplement thereof, or to any superceding contract which may now be in effect;

(d) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Withdraw all recognition from Kinner Motors Employees Association, Inc., as the representative of any of its employees for the purposes of collective bargaining with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, and completely disestablish Kinner Motors Employees Association, Inc., as such representative;

(b) Post immediately in conspicuous places throughout the respondent's Glendale plants, and maintain for a period of sixty (60) consecutive days from this date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraphs 1 (a), (b), (c) and (d) of these recommendations; (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the Twenty-first Region, in writing within ten (10) days from the receipt of this Intermediate Report what steps the respondent has taken to comply therewith;

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report the respondent notify said Regional Director in writing that it has complied with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such excep-

tions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

HOWARD MYERS

Trial Examiner

Dated: January 25, 1944.

[Title of Board and Cause.]

Case No. 21-C-2307

AFFIDAVIT AS TO SERVICE

District of Columbia—ss.

I, Georgie Coates, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 22nd day of July, 1944, I mailed postpaid, bearing Government frank, by registered mail, a copy of the Decision and Order (and Intermediate Report) to

the following named persons, addressed to them at the following addresses:

International Association of Machinists, District Lodge No. 94. Att: Mr. Roscoe Ickes, 123 W. 18th St., Los Angeles, Calif. (69193*)

International Association of Machinists. Att: Mr. Carl Huhndorf, 711 Machinists' Bldg., Washington, D. C. (69194*)

Kinner Motors, Inc., Glendale, Calif. (69195*)

Mr. Victor Ford Collins, 1111 Board of Trade Building, Los Angeles, Calif. (69196*)

Mr. James S. Woollacott, 215 W. 7th St., Los Angeles, Calif. (69197*)

Kinner Motors Employees Association, Inc., Att: Pearson & Proctor, 218 Security Bank Bldg., Burbank, Calif. (69198*)

GEORGIE COATES

Subscribed and sworn to before me this 22nd day of July, 1944.

VINCENT THOMPSON

Designated Agent for the
N.L.R.B.

* Numbers stamped on face Return Receipts.

[Printer's Note]: Six Return Receipts attached.

[Title of Board and Cause.]

Case No. 21-C-2307

STATEMENT OF EXCEPTIONS TO THE
PROCEEDINGS ON THE HEARING AND
TO THE INTERMEDIATE REPORT

Come now Kinner Motors, Inc., respondent in the above entitled matter and Kinner Motors Employees' Association, Inc., intervener in the above entitled matter, and submit herewith their statements setting forth exceptions to the hearing and proceedings therein, and to the Intermediate Report of the Trial Examiner dated January 25, 1944, which was transferred to the Board under date of January 28, 1944.

Exceptions to proceedings at the hearing.

Exception No. 1

Reporter's Transcript—Page 11 to 22:

“Mr. Collins: We object, if the Examiner please, to the introduction of these exhibits upon the ground that under Act 1944, Chapter 221, Public Law 135, 78th Congress, First Session, that on the face of them they show there is no jurisdiction for the proceeding, which would be the basis of the motion.

Trial Examiner Myers: What are your grounds? You say there is no basis.

Mr. Collins: On the ground that the proceeding has not been brought within three months, within the period of three months of the agreement concerning which the complaint is filed.

Trial Examiner Myers: You mean this written agreement between the Kinner Motors, Inc. and Kinner Motors Employees Association, Inc.?

Mr. Collins: That is right. That will be the basis of the motion that I intend to make, and I want to preserve——

Trial Examiner Myers: Why don't you go ahead with your motion now? I think this is an appropriate time to make it.

Mr. Collins: Thank you. If the Examiner please, on behalf of the Kinner Motors, Inc., we ask for dismissal of this entire proceeding, and we object to the continuance of the proceeding upon the grounds that under the Federal Security Appropriation Act 1944, Chapter 221, Public Law 135, 78th Congress, the proceeding was not initiated in time so there could be jurisdiction.

In Paragraph 5 it admits and in fact alleges, in the complaint, itself, that the agreement referred to between Kinner Motors, Inc. and the Kinner Motors Employees Association, Inc. was entered into on or about June 16, 1943; entered into a written agreement with the association. It is further alleged by its terms that it has remained in full force and effect from on or about June 16, 1943, to and including the date of this complaint. The Examiner, I know, is very familiar with the language of the Act, to which I refer, which provides——

Trial Examiner Myers: You mean the rider to the Appropriations Bill?

Mr. Collins: That is right, which provides that "No part of the funds appropriated in this title

shall be used in any way in connection with a complaint case arising over an agreement between management and labor, which has been in existence for three months or longer without the complaint being filed.”

Trial Examiner Myers: Does it say “complaint?”

Mr. Collins: Yes, it says “complaint.” It does not say “charges”; very definitely it does not.

I want to call the Examiner’s attention, further, to the fact that the alleged charge could not apply in this particular case because it was filed prior to the execution of the agreement. There is no charge even filed by the A. F. of L., the charge was filed in May, prior to the execution of the agreement and could not apply. So there is no charge here even filed with the Government.

Particularly the language of the statute is very clear; it says “Complaint.” In all the authorities of all the jurisdictions they refer to the complaint as that which is issued by the Board; not the charge. There is quite a distinction.

Trial Examiner Myers: I understand that.

Mr. Collins: In this case we not only have that provision to rely on, we have the further contention that the charge by the union was not directed at all to the agreement which is involved. It was filed prior to that time. We do not have, even before this Examiner, a charge to the Board, as against the contract which is involved.

I feel, under those circumstances, that we will

be taking the time of a great many men here, and not only of counsel, but particularly this plant is in crucial war industry, and every man that is taken away to appear here to a proceeding where there is no jurisdiction will be taken away from the building of engines for war planes.

Trial Examiner Myers: You shouldn't have witnesses here that are not absolutely necessary. If you have any witnesses we will wait for the witnesses or we will go over to wherever the plant is and conduct a hearing near the plant.

What about this rider, Mr. Harrington?

Mr. Harrington: Well, the charges was filed before the complaint was entered into. Therefore, it was certainly within the three months period.

Trial Examiner Myers: You mean before the contract was entered into?

Mr. Harrington: Before the contract was entered into.

As to the word "complaint" the Comptroller General has ruled that complaint means charge. Here we had a charge that the company had dominated, originated and dominated the union. That charge was issued in May. So certainly this thing comes within the three months period.

Trial Examiner Myers: Do you have a copy of the Attorney General's opinion?

Mr. Harrington: No, I don't have. You mean the Comptroller General's ruling?

Trial Examiner Myers: Yes.

Mr. Harrington: No.

Mr. Collins: Might I point this out to the Examiner: The charge could not possibly be directed to the contract that had not been entered into. In other words, the domination could have entirely ceased. I think that we can indulge here in the presumption that there was no interference. I think any presumption is not orderly and usual procedure of business, so that the charge that was filed has absolutely nothing to do with the question of the contract. There is not even any charge that the contract arose out of any domination. There is not even any charge that the domination had not entirely ceased prior to the execution of the agreement.

So that we are here without any charges as to the validity or the effect of the domination as to the agreement which is complained of. And I can't believe that until I see that Comptroller General's opinion. I can't believe that under any law as applicable to this there might be something that has nothing to do with this, but when the statutes specifically refer to a complaint by the Board——

Trial Examiner Myers: Have you a copy of the Comptroller General's opinion in your office?

Mr. Proctor: For the purpose of the record I would like to make that motion my motion, as well.

Trial Examiner Myers: You mean you join with Mr. Collins in his motion; is that correct?

Mr. Proctor: That is right.

Trial Examiner Myers: We will take a thirty minute recess at at this time.

(Recess taken.)

Trial Examiner Myers: Are you ready, gentlemen?

Mr. Proctor: We are ready.

Mr. Harrington: The Board is ready.

Mr. Collins: If the Examiner please, there is certain language in the letter of the Comptroller General to the National Labor Relations Board that refers to the charge. I would say as far as he is concerned it apparently refers it back to the charge. Wouldn't you think so, Mr. Woollacott?

Mr. Woollacott: Yes.

Mr. Collins: However, the only two or three decisions which we have, of any court, upon the subject, and, after all, it would be the court's interpretation and not his, are based entirely upon the complaints which were filed prior to the amendment which we are relying on.

I don't see how any person could possibly read the language or how any court could read the language that we have in the law and construe it as being anything other than the complaint, which has a very designated meaning in this sort of procedure. And in all of the other references connected with the National Labor Relations Board, to the charge, it refers to the complaint issued by the Board. So the decisions we have now, none of them are in any way in point. They have to do with complaint and proceedings that were instituted prior to the enactment of this amendment we referred to. This brief was in one of these cases, and that case itself had to do with the complaint which was instituted, filed by the National Labor Rela-

tions Board itself prior to the enactment of the Amendment we are relying upon.

I want to call your attention further, however, in this particular case that no charge was filed within the three months period at all, by anything, even a charge as to the contract which is involved. Now, to ignore that would be simply to say that this Act, which we rely upon, absolutely has no meaning; because it is very specific and even if you read the complaint as charged, where we have a contract, as we have here, it must apply to a charge that is involved and is addressed against the contract, because it says this:

‘No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor, which has been in existence for three months or longer without the complaint being filed;’

I don't see how you could possibly have jurisdiction in this particular case. Nothing has been shown or indicated to me that changes my thought or opinion on the subject. I earnestly urge this be dismissed. Certainly, I urge that we not be put to the cost and expense of this proceeding, and particularly to the loss of production. You can see that by the number of men that are retained here until we have a ruling upon this particular case.

Trial Examiner Myers: Does anybody want to be heard in support of the motion?

Mr. Proctor: In behalf of Kinner Motors Em-

ployees' Association, we adopt the statement of counsel for Kinner Motors, Inc., as our motion, and wish to incorporate it as a part of a motion I would make.

Trial Examiner Myers: Does anybody else want to say anything in support of the motion?

Do you want to add anything, Mr. Harrington?

Mr. Harrington: All I would like to add, Mr. Examiner, is that the Comptroller General's ruling on it is very specific. The Comptroller General's ruling is binding on executive agencies and it is binding on this Board.

Under the Comptroller General's ruling this case clearly is a case in which a charge has been filed within the three months and, therefore, it does not come within the appropriation order.

I might state the rider has been passed on by three Circuit Court of Appeals:

It has been passed on by the Fourth Circuit in the Baltimore Transit Company case; it has been passed on by the Second Circuit in the Elvine Knitting Mills case, and it has been passed on by the Ninth Circuit in the Cowell-Portland Cement Company case.

In all those cases the Court ruled in accordance with the Board's contention as to the meaning of the Board's rider, and in accordance with the Comptroller General's ruling.

Mr. Collins: Isn't it a fact that all those complaints and proceedings had been instituted prior to the passage of this Amendment?

Mr. Harrington: That is true in the Baltimore case. I don't know whether it is true in any of the other cases.

Mr. Collins: Isn't it a fact that in none of those cases was there a charge in relation to the contract, after the contract. For instance, in the one you are just referring to, the Elvine Knitting Mills case, it held, ". . . no bar to Board's order based upon findings that employer engaged in unfair labor practices in violation of Section 8 (1) and 8 (2) of National Labor Relations Act where Board petition for enforcement was filed before passage of the appropriation statute. . ."

Those, you see, Mr. Examiner, do not apply to this particular situation that we have here.

We have a case here, and that is true of all of these, and even your own Reporter in analyzing—

Mr. Harrington: I might remark that is not our Reporter.

Mr. Collins: Whatever Reporter this is.

Trial Examiner Myers: David Lawrence.

Mr. Harrington: Labor Relations Reporter.

Mr. Collins: It does not apply to the complaint stage. And all of those cases that have been decided have been, as far as I can find any language at all in them, absolutely not applicable to this. They are in connection with complaints filed prior to the passing of the statute.

Trial Examiner Myers: Another point in those cases cited by Mr. Harrington, the charge was filed more than three months after the making of the

contract. In this case we have the making of the contract three months after the filing of the charge.

Mr. Harrington: Within three months of the filing of the charge. The charge was filed in May, the contract was entered into in June.

Mr. Collins: The charge was filed before the making of the contract. The statute requires after the making of the contract. You can't file an anticipatory action that isn't in any statute.

Mr. Harrington: The charge is directed towards domination and support of the Kinner Motors Employees Association, and that is what the charge is specifically directed to.

Now, the entering into a contract would be just another instance of domination and support. I might also add that when this contract was entered into both the Company and the Association were under notice that the charge had been issued in respect to the Association. They entered into this contract with notice that the Board was proceeding in the matter.

Trial Examiner Myers: Does anybody else want to say anything either for or against the motion?

Mr. Collins: I have nothing further to say, except to repeat my request that this point be decided by formal order of the National Labor Relations Board before we be put to the expense of a trial.

Trial Examiner Myers: I will deny the motion to dismiss; that is, the motion to dismiss on the grounds that the rider to the Appropriation Bill is a bar to this proceeding.

If you want to take the matter up with the Board

you may do so, either by phone or telegram. I won't suspend the hearing for the purpose of getting a decision, because we don't know when the Board will have an opportunity to pass upon your application.

Mr. Collins: Then may the record show an exception and also any proceedings from here on are subject to our exception?

Trial Examiner Myers: Yes, sir. Are there any other objections?

Mr. Proctor: May that exception be taken on behalf of Kinner Motors Employees' Association?

Trial Examiner Myers: I might say, reiterate that the parties have an automatic exception to all my rulings, that is, they have exception to all the adverse rulings.

Mr. Collins: Then there is no necessity for us to enter an exception on the record.

Trial Examiner Myers: That is right. As I understand it, we will proceed with this hearing over your objection; is that right?

Mr. Collins: Right.

Mr. Proctor: Right.

Exception No. 2

Reporter's Trans. Page 23

Mr. Collins: We would like to add the further objection to the introduction of the complaint, and the charge, that the complaint does not conform to the charge. In other words, the complaint is based upon the contract. This ties into the motion which we made. We want to preserve it all the way along.

We object to the introduction on that ground, that the complaint refers to the contract, charges against the contract.

Trial Examiner Myers: Very well, sir. I will overrule that objection.

Exception No. 43

Reporter's transcript—Page 559 and 560

“Mr. Collins: Yes, I would like to add to that——

Trial Examiner Myers: The motion to dismiss on the ground the rider is a bar to these proceedings is denied.

Mr. Collins: I wish, if the Court please, to move to dismiss upon the ground that the complaint itself, in this action, alleges and was also stipulated by all parties that the Kinner Motors Employees Association, Inc. is a duly organized labor organization under subdivision 5 of Section 2 of the Act.

Trial Examiner Myers: The motion is denied.”

Exception No. 43-A

Reporter's trans.—Pages 586 to 588, incl.

“I can't close, if the Examiner please, without still harping on my theory of the law in this case in connection with the lack of jurisdiction.

I have read that law again and it seems to me so clear that there just couldn't be any question in it, in this particular case. For two reasons: First of all, no complaint was filed and I don't believe that any Federal Court, when this matter is passed upon by a Federal Court, will hold that a charge filed

with the Board is tantamount and equal to a complaint that is issued by the Board.

Now, we have a rule of interpretation of statutes that you can't read into it something—particularly a Penal statute—you can't read into the statute something that isn't there by import or by some character of language. There isn't a word in this about a charge. It uses the language "complaint."

We must presume, when our Congress passed that, certainly it chose and used the language that it desired to use. We are not bound by the Comptroller General's attempt to use his own argument as to why they should have used another word; why they should have said, "charge." All we have to consider is that they didn't use "charge" and used the word "complaint," so that even there legally I can't possibly see how there is any jurisdiction in this particular case. But the charge was not filed to the particular contract that is a bona fide bargaining agreement between these people. It was filed long prior to the execution of the contract, and no charge was filed, although they had a right to do it. No charge was filed by the A. F. of L. against the contract itself. I think that, in itself, is determinative of this matter.

Again I want to call your attention to the point which I made by way of a motion, which you said, and I can't find the authorities—I haven't been able to find them—your Honor spoke of the other day; there were authorities. But it seems to me if in the complaint they allege that this is a **valid union**, and then they stipulate it is a union within the

purview of sub-section 5 of Section 2, I can't possibly see how once they have stipulated to it, before this Examiner, how they can then turn around and say it is not valid, but is an invalid Association.

Trial Examiner Myers: They didn't stipulate it was a valid Association.

Mr. Collins: He certainly did.

Trial Examiner Myers: He said it was a labor organization within the meaning of the Act.

Mr. Collins: No, he didn't use the word "valid." The Examiner is right. If it is an association, then it must necessarily be valid or it isn't anything. If it isn't an association, it is invalid. By the same token, if it is an association it cannot be invalid.

Mr. Wollacott calls my attention to this, too: He said it was within the meaning of the Act; to add emphasis to the contention we are making."

This motion was reserved by the Trial Examiner, who in his Intermediate Report on Page 2, Lines 31 to 38, states as follows:

"At the commencement of the hearing, counsel for the respondent moved, in which motion counsel for the Association joined, to dismiss the proceeding on the ground the proceeding was barred by the rider attached to the Federal Security Appropriation Act of 1944, Chapter 221, Public Law 135, 78th Congress. The motion was denied. This motion was again renewed, and each time joined in by counsel for the Association, at the conclusion of the Board's case and at the end of the hearing. The motions were again denied."

The following exceptions are made to the Intermediate Report.

Exception No. 44

The evidence is insufficient to sustain the finding on Page 3, Line 26, which reads as follows:

“Soon after the union organizing campaign began, R. W. Walker, who had charge of the night shift once each week, obtained permission from Foreman B. C. Johnson to ask the “boys” about forming an inside organization.”

Exception No. 45

The evidence is insufficient to sustain the finding on Page 3, Line 29, which reads as follows:

“During a lunch period Walker called together all of the employees on his shift and, in Johnson’s presence, told them, according to his own admission, that “the A. F. of L. was hand-billing us at the gate,” and “that we were going to have some sort of an organization pretty soon, and I thought it would be a good idea if we had one of our own.”

Exception No. 46

The evidence is insufficient to sustain the findings on Page 3, Lines 35, 36, and 37, that John Williams, Orville Gilbert, and Howard Sharrar were leadmen.

Exception No. 47

The evidence is insufficient to sustain the finding on Page 3, Line 61, which reads as follows:

“Whether he heard Walker’s speech or not is immaterial, since it is undisputed that after being

informed of the nature of the speech he authorized its delivery.”

Exception No. 48

The evidence is insufficient to sustain the finding on Page 4, Line 1, etc., which reads as follows:

“Williams distributed these cards among other leadmen who, in turn, solicited the signatures of employees throughout the plant during working hours. Foreman Johnson and W. J. Kroening, a supervisory employee, also distributed these cards and urged employees to join the Association. Foreman Earl H. Friar told employees during smoking periods at the plant that he favored the association, and paid initiation fees into the organization.”

Exception No. 49

The evidence is insufficient to sustain the finding on Page 4, commencing on Line 13, which reads as follows:

“Although promoted on May 1, being placed in charge of the receiving department, with supervision over three other clerks and a mover, Stevens remained in office as head of the Association.”

Exception No. 50

The evidence is insufficient to sustain the finding on Page 4, commencing at Line 34, which reads as follows:

“The evidence is clear that at the time of his activity on behalf of the Association Kroening had supervisory powers, whatever his title or classification.”

Exception No. 51

The evidence is insufficient to sustain the finding on Page 4, Line 38, which reads as follows:

“Kroening stated that he had up to 10 men under his supervision, that he checked their work, instructed new employees, and that several employees whom he recommended for wage increases received them. The undersigned finds that his position and duties were such that employees reasonably considered his Association activities as having the approval and support of management.”

Exception No. 52

The evidence is insufficient to sustain the finding on Page 4, Line 45, which reads as follows:

“Johnson denied having either passed out cards or advising employees to join. The undersigned does not accept his denial as true.”

Exception No. 53

The evidence is insufficient to sustain the finding on Page 5, Line 45, which reads as follows:

“During the summer an election was conducted among the employees of the night shift, during working hours and with the knowledge of Foreman Johnson, to select a steward to attend Association meetings. Leadman Cadaret was elected. He thereafter attended Association meetings, which were held during his working hours, without punching out his time cards. There is no evidence that any deduction was ever made for time thus lost from his work. Cadaret testified that he did not ask to be

“excused” for such absences. Under the circumstances it is reasonable to infer, and the undersigned finds, that Cadaret was permitted by the respondent to leave his work, without pay deduction, to attend Association meetings.”

Exception No. 54

The evidence is insufficient to sustain the finding on Page 5, Line 55, which reads as follows:

“In September President Stevens of the Association and employee Colburn consulted Chief Inspector Williams and obtained his permission to have Colburn serve as secretary-treasurer of the Association.”

Exception No. 55

The evidence is insufficient to sustain the finding on Page 6, Line 6, which reads as follows:

“At the night shift meeting he also told employees that while he had no right to solicit their membership in the Association, it had been organized for them and he thought it best for them to join.”

Exception No. 56

The evidence is insufficient to sustain the conclusions on Page 6, Line 10 to Line 40, inclusive, which reads as follows:

“Upon the entire record, the undersigned is convinced and finds that the Association is the creature of the respondent and was brought into existence and utilized by the respondent to defeat and forestall the organization efforts of the Union. The contention of the respondent that the Associa-

tion was the spontaneous result of the organizational desires of its employees is not supported by the record. As noted above, just before the Association was formed, Foreman Johnson permitted his assistant, Walker, to address all employees on the night shift and urge the formation of an inside organization. The Association was thereafter formed. Solicitation of members occurred openly and during working hours. Association cards were distributed by Johnson and Kroening. Foreman Friar joined the organization and told employees that he favored the Association. Nor did the respondent cease to interfere with and give support to the Association after its organization. As found above, Leadman Cadaret was permitted to leave his work on the night shift to attend Association meetings, without pay deduction, Chief Inspector Williams was consulted as to whether or not one of the employees under him could serve as an Association Officer, and Sullivan plainly advised employees on the night shift in November, that it would be best for them to join the Association.

The undersigned finds that by the foregoing acts the respondent has dominated and interfered with the formation and administration of the Association and has contributed financial and other support to it, thereby interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act."

Exception No. 57

The evidence is insufficient to sustain the finding on Page 6, Line 50 through Line 63, which reads as follows:

“The findings as to the additional remarks made by Sullivan at the night shift meeting rest upon the credible testimony of employee Davis. As to the other remarks, the findings are based upon a document in evidence which Sullivan described as being the transcription of notes made by his stenographer of his statement to the day shift. No stenographer was present at the night session. He denied having advised employees to join the Association. The undersigned does not accept his denial as true.

Although the record contains persuasive evidence that leadmen who formally organized and became officers of the Association possessed supervisory powers, the undersigned considers it unnecessary to determine that point here. Whatever their supervisory powers, it is clear that they were acting with the support and approval of management.”

Exception No. 58

The evidence is insufficient to sustain the recommended remedies referred to in Paragraph 5, Page 7, Lines 5 to 41, inclusive.

Exception No. 59

The evidence and findings are insufficient to justify conclusions of law, Paragraph 2, Page 7, Lines 50 to 54, inclusive, which reads as follows:

“By dominating and interfering with the formation and administration of Kinner Motors Employees Association, Inc., and contributing financial and other support to it, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (2) of the Act.”

Exception No. 60

The evidence and findings of fact are insufficient to justify the conclusion of law in Paragraph 3, Page 7, Lines 55 through 59, which reads as follows:

“By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.”

Exception No. 61

The evidence and findings of fact are insufficient to justify the conclusion of law in Paragraph 4, Page 7, Lines 60 through 63, which reads as follows:

“The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.”

Exception 62

The evidence and findings of fact and conclusions of law are insufficient to justify the recommendations contained on Page 8, Line 1 to Line 62, inclusive.

Exception No. 63

The undersigned except to the ruling of the Trial Examiner as contained in his Intermediate Report, Page 2, Line 42, as follows, to-wit:

“Motions by the respondent’s counsel and by the Association’s counsel to dismiss the entire proceeding for failure of proof were taken under consideration and are now denied.”

Respectfully submitted,

VICTOR FORD COLLINS and
JAMES S. WOOLLACOTT

By VICTOR FORD COLLINS

Attorneys for Kinner Motors,
Inc.

PEARSON & PROCTOR

By MARLAN PROCTOR

Attorneys for Kinner Motors
Employees’ Assn. Inc.

In the United States Circuit Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KINNER MOTORS, INC.,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board—Series 3, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding had before said Board entitled, “In the Matter of Kinner Motors, Inc. and International Association of Machinists, District Lodge No. 94 for and on behalf of Lodge No. 311, A.F.L.,” Case No. 21-C-2307 before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of order designating Howard Myers Trial Examiner for National Labor Relations Board, dated December 13, 1943.

(2) Stenographic transcript of testimony held before Howard Myers, Trial Examiner for the National Labor Relations Board on December 13, 15, 16 and 17, 1943, together with all exhibits introduced into evidence.

(3) Copy of Trial Examiner's Intermediate Report, dated January 25, 1944 (attached to Item No. 12).

(4) Copy of order transferring case to the Board, dated January 28, 1944.

(5) Copy of respondent's and Association's letter, dated February 2, 1944, requesting extension of time to file exceptions and brief, and copy of telegram granting extension.

(6) Copy of respondent's request for oral argument before the Board, dated February 4, 1944.

(7) Copy of respondent's and Association's exceptions to the Intermediate Report.

(8) Copy of notice of hearing for purpose of oral arguments before the Board, dated April 10, 1944.

(9) Copy of respondent's telegram, dated April 13, 1944, requesting postponement of oral argument.

(10) Copy of notice of postponement of hearing for purpose of oral argument, dated April 15, 1944.

(11) Copy of list of appearances at oral argument held before the Board on May 16, 1944.

(12) Copy of decision and order issued by the National Labor Relations Board July 22, 1944, with annexed Intermediate Report, together with

affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 20th day of December 1944.

[Seal]

JOHN E. LAWYER

Chief, Order Section

NATIONAL LABOR RELATIONS BOARD

[Title of Circuit Court of Appeals and Cause.]

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, Stat. 449, c. 372, 29 U.S.C. § 151, et seq.), respectfully petitions this Court for the enforcement of its order against respondent, Kinner Motors, Inc., Glendale, California, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Kinner Motors,

Inc. and International Association of Machinists, District Lodge No. 94 for and on behalf of Lodge No. 311, A.F.L., Case No. 21-C-2307.”

In support of this petition, the Board respectfully shows:

(1) Respondent is a California corporation, and is engaged in business in the State of California, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof, certified by the Board and filed with this Court herein, to which reference is hereby made, the Board, on July 22, 1944, duly issued an order directed to the respondent, and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the foregoing findings of fact and the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Kinner Motors, Inc., Glendale, California, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Dominating or interfering with the administration of, or contributing support to, Kinner Motors Employees Association, Inc., and domi-

nating or interfering with the formation or administration of, or contributing support to, any other labor organization of its employees;

(b) Giving effect to its contract of June 16, 1943, with Kinner Motors Employees Association, Inc., or to any revision, renewal, extension, modification, or supplement thereof or to any superseding contract which may now be in effect;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, Lodge No. 311, affiliated with the American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Withdraw all recognition from Kinner Motors Employees Association, Inc., as the representative of any of its employees for the purposes of collective bargaining with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, and completely disestablish Kinner Motors Employees Association, Inc., as such representative;

(b) Post immediately in conspicuous places throughout its plant in Glendale, California, and

maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of this Order; and (2) that it will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

(3) On July 22, 1944, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Victor Ford Collins, Esquire, and James S. Woollacott, Esquire, respondent's attorneys, Los Angeles, California.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceeding before the Board, including the pleading, testimony and evidence, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the

transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board and requiring respondent, and its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR RELATIONS BOARD

MALCOLM F. HALLIDAY

Associate General Counsel

Dated at Washington, D. C., this 20th day of December, 1944.

District of Columbia—ss.

Malcolm F. Halliday, being first duly sworn, states that he is Associate General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

MALCOLM F. HALLIDAY

Associate General Counsel

Subscribed and sworn to before me this 20th day of December, 1944.

[Seal] JOHN E. LAWYER

Notary Public, District of Columbia. My Commission Expires August 14, 1949.

[Endorsed]: Filed Dec. 28, 1944. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCE-
MENT OF AN ORDER OF NATIONAL
LABOR RELATIONS BOARD

To the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Comes now Kinner Motors, Inc., Respondent in the above-entitled matter, in answer to the petition for enforcement of an order of the National Labor Relations Board, and respectfully denies and alleges as follows:

I.

Admits all of the allegations of Paragraphs I, II, III, and IV of said petition.

II.

This respondent respectfully urges that said petition for enforcement be denied on the following grounds, to wit:

1. The Board had no jurisdiction by reason of the failure to file a complaint within three months after the execution of the labor agreement, as required by the Appropriation Rider, Act of 1944, Chapter 221, Public Law 135, 78th Congress.

2. The Board's Findings of Fact are not supported by any substantial evidence.

3. The facts so found are insufficient to sustain the Order that the Respondent has engaged, or is engaging in, unfair labor practices within the meaning of Section 8 (2) and (1) of the Act.

4. The Board's Order is invalid.

Wherefore, Respondent prays that said petition for enforcement be denied.

VICTOR FORD COLLINS

Attorney for Respondent

Kinner Motors, Inc.

State of California,

County of Los Angeles—ss.

Victor Ford Collins, being by me first duly sworn deposes and says: That he is the Attorney for the Respondent. Kinner Motors, Inc., in the above-entitled action; that he has read the foregoing Answer To Petition For Enforcement Of An Order Of National Labor Relations Board, and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

VICTOR FORD COLLINS

Subscribed and Sworn to before me this 4th day of January, 1945.

[Seal]

ELIAS MANSFIELD

Notary Public in and for the County of Los Angeles
State of California

AFFIDAVIT OF SERVICE BY MAIL

State of California,

County of Los Angeles,—ss.

E. Olsen, being duly sworn says: That affiant is a citizen of the United States, over the age of 18 years, a resident of Los Angeles County and not a party to the within action.

That affiant's business address is 1111 Board of Trade Building, 111 West Seventh Street, Los Angeles 14, California.

That affiant served a copy of the attached Statement of Points Relied Upon By The Respondent, Kinner Motors, Inc., Designation of Those Portions of The Record To Be Printed, and Answer To Petition For Enforcement of An Order of National Labor Relations Board, by placing a copy of each in an envelope addressed to:

Malcolm F. Halliday, Esq.,
Associate General Counsel,
National Labor Relations Board,
Washington 25, D. C.,

this being his business address, which envelope was then sealed and postage fully prepaid thereon, and thereafter on January 5, 1945 deposited in the United States Post Office at Los Angeles, California; that there is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

E. OLSEN

Subscribed and Sworn to before me this 5 day of January, 1945.

[Seal]

ELIAS MANSFIELD

Notary Public in and for the County of Los Angeles
State of California.

[Endorsed]: Filed Jan. 8, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON
BY THE BOARD

Pursuant to Section 6 of Rule 19 of the Court, the Board submits the following statement of points upon which it intends to rely in the above entitled proceeding:

I.

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (2) and (1) of the Act.

II.

The Board's order is valid.

Dated at Washington, D. C., this 20th day of December 1944.

MALCOLM F. HALLIDAY

Associate General Counsel

National Labor Relations
Board.

[Endorsed]: Filed Dec. 28, 1944. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY
THE RESPONDENT, KINNER MOTORS,
INC.

Pursuant to Section 6 of Rule 19 of the Court,

the Respondent, Kinner Motors, Inc., submits the following Statement of Points upon which it intends to rely in the above-entitled proceeding:

I.

The Board had no jurisdiction by reason of the failure to file a complaint within three months after the execution of the agreement, as required by the appropriation rider, Act of 1944, Chapter 221, Public Law, 135, 78th Congress.

II.

The Board's Findings of Fact are not supported by any substantial evidence.

III.

The facts so found are insufficient to sustain the Order, that the Respondent has engaged, or is engaging in, unfair labor practices within the meaning of Section 8 (2) and (1) of the Act.

IV.

The Board's Order is invalid.

VICTOR FORD COLLINS

Attorney for Respondent,
Kinner Motors, Inc.

AFFIDAVIT OF SERVICE BY MAIL

State of California,
County of Los Angeles—ss.

E. Olsen, being duly sworn says: That affiant is a citizen of the United States, over the age of 18

years, a resident of Los Angeles County and not a party to the within action.

That affiant's business address is 1111 Board of Trade Building, 111 West Seventh Street, Los Angeles 14, California.

That affiant served a copy of the attached Statement of Points Relied Upon By The Respondent, Kinner Motors, Inc., Designation of Those Portions of The Record To Be Printed, and Answer To Petition For Enforcement of An Order of National Labor Relations Board, by placing a copy of each in an envelope addressed to:

Malcolm F. Halliday, Esq.,
Associate General Counsel,
National Labor Relations Board,
Washington 25, D. C.,

this being his business address, which envelope was then sealed and postage fully prepaid thereon, and thereafter on January 5, 1945 deposited in the United States Post Office at Los Angeles, California; that there is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

E. OLSEN

Subscribed and Sworn to before me this 5 day of January, 1945.

[Seal] ELIAS MANSFIELD

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jan. 8, 1945. Paul P. O'Brien, Clerk.

ORDER TO SHOW CAUSE

CCA No. 10956

United States of America,—ss.

The President of the United States of America:

To Kinner Motors, Inc., Glendale, California; International Association of Machinists, District Lodge No. 94, Att: Mr. Roscoe Ickes, 123 W. 18th St., Los Angeles, California, and Kinner Motors Employees Association, Inc., Att: Pearson & Proctor, 218 Security Bank Bldg., Burbank, California.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 28th day of December, 1944 a petition of the National Labor Relations Board for enforcement of its order entered on July 22, 1944 in a proceeding known upon the records of the said Board as "In the Matter of Kinner Motors, Inc., and International Association of Machinists, District Lodge No. 94 for and on behalf of Lodge No. 311, A.F.L., Case No. 21-C-2307." and for entry of a decree by the United States Circuit Court of Appeals for the Ninth Circuit, was filed in the said United States Circuit Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of

such action the said Circuit Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, this 28th day of December in the year of our Lord one thousand nine hundred and forty-four.

[Seal] PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

RETURN ON SERVICE OF WRIT

United States of America,
Southern District of California—ss.

I hereby certify and return that I served the annexed Order to show cause on the therein-named Mr. Roscoe Icker as authorized agent for International Association of Machinists, District Lodge No. 94 by handing to and leaving a true and correct copy thereof with him personally at Los Angeles in said District on the 5th day of December, 1944.

ROBERT E. CLARK

U. S. Marshal.

By T. R. KEERE

Deputy.

Marshal's Fees	\$ 6.00
Mileage	
Expenses	1.75
	<hr/>
Total	\$ 7.75

#27296

RETURN ON SERVICE OF WRIT

United States of America,
So. District of Calif.—ss.

I hereby certify and return that I served the annexed Order to show cause on the therein-named Pearson & Proctor as representatives and authorized agents of Kinner Motors Employees Association, Inc. by handing to and leaving a true and correct copy thereof with Marlan A. Proctor Attorney at Law Co-Partners Pearson & Proctor personally at Burbank, in said District on the 3rd day of January, 1945.

ROBERT E. CLARK

U. S. Marshal.

By CHARLES W. ROSS

Deputy.

#27296

RETURN ON SERVICE OF WRIT

United States of America,
So. District of Calif.—ss.

I hereby certify and return that I served the annexed Order to show cause on the therein-named Kinner Motors Inc. by handing to and leaving a true and correct copy thereof with G. Edenguist Vice-President for Kinner Motors Inc. personally at Glendale in said District on the 2nd day of January, 1945.

ROBERT E. CLARK

U. S. Marshal.

By CHARLES W. ROSS

Deputy.

Before the National Labor Relations Board
Twenty-First Region

Case No. 21-C-2307

In the Matter of

KINNER MOTORS, INC.

and

**INTERNATIONAL ASSOCIATION OF MACH-
INISTS DISTRICT LODGE No. 94, for and
on behalf of Lodge No. 311, AFL.**

Room 901, Board of Trade Building,
111 West Seventh Street,
Los Angeles, California.
Monday, December 13, 1943.

The above-entitled matter came on for hearing,
pursuant to notice at 10:00 o'clock a.m.

Before: Howard Myers, Trial Examiner.

Appearances:

Daniel J. Harrington,
Attorney for the National Labor Relations
Board.

Victor Ford Collins,
1111 Board of Trade Building, Los An-
geles, California, appearing on behalf of
Kinner Motors, Inc.

James S. Woollacott,

215 West 7th Street, Los Angeles, California, appearing on behalf of Kinner Motors, Inc. [1*]

Roscoe Ickes,

123 West 18th Street, Los Angeles, California, appearing on behalf of International Association of Machinists District Lodge No. 94, for and on behalf of Lodge No. 311, AFL.

Pearson & Proctor, by Marlan Proctor,

218 Security Bank Building, Burbank, California, appearing on behalf of Kinner Motors Employees Association, Inc.

[2]

Mr. Collins: We object, if the Examiner please, to the introduction of these exhibits upon the ground that under Act 1944, Chapter 221, Public Law 135, 78th Congress, First Session, that on the face of them they show there is no jurisdiction for the proceeding, which would be the basis of the motion.

Trial Examiner Myers: What are your grounds? You say there is no basis.

Mr. Collins: On the ground that the proceeding has not been brought within three months, within the period of three months of the agreement concerning which the complaint is filed.

Trial Examiner Myers: You mean this written

*Page numbering appearing at top of page of original Reporter's Transcript.

agreement between the Kinner Motors, Inc. and Kinner Motors Employees Association, Inc.?

Mr. Collins: That is right. That will be the basis of the motion that I intend to make, and I want to preserve——

Trial Examiner Myers: Why don't you go ahead with your motion now? I think this is an appropriate time to make it. [11]

Mr. Collins: Thank you. If the Examiner please, on behalf of the Kinner Motors, Inc. we ask for dismissal of this entire proceeding, and we object to the continuance of the proceeding upon the grounds that under the Federal Security Appropriation Act 1944, Chapter 221, Public Law 135, 78th Congress, the proceeding was not initiated in time so there could be jurisdiction.

In Paragraph 5 it admits and in fact alleges, in the complaint, itself, that the agreement referred to between Kinner Motors, Inc. and the Kinner Motors Employees Association, Inc. was entered into on or about June 16, 1943; entered into a written agreement with the association. It is further alleged by its terms that it has remained in full force and effect from on or about June 16, 1943, to and including the date of this complaint. The Examiner, I know, is very familiar with the language of the Act, to which I refer, which provides—

Trial Examiner Myers: You mean the rider to the Appropriations Bill?

Mr. Collins: That is right, which provides that “No part of the funds appropriated in this title shall be used in any way in connection with a com-

plaint case arising over an agreement between management and labor, which has been in existence for three months or longer without the complaint being filed, * * *” [12]

Trial Examiner Myers: Does it say “complaint?”

Mr. Collins: Yes, it says “complaint.” It does not say ‘charges’; very definitely it does not.

I want to call the Examiner’s attention, further to the fact that the alleged charge could not apply in this particular case because it was filed prior to the execution of the agreement. There is no charge even filed by the A. F. of L., the charge was filed in May, prior to the execution of the agreement and could not apply. So there is no charge here even filed with the Government.

Particularly the language of the statute is very clear; it says “Complaint.” In all the authorities of all the jurisdictions they refer to the complaint as that which is issued by the Board; not the charge. There is quite a distinction.

Trial Examiner Myers: I understand that.

Mr. Collins: In this case we not only have that provision to rely on, we have the further contention that the charge by the union was not directed at all to the agreement which is involved. It was filed prior to that time. We do not have, even before this Examiner, a charge to the Board, as against the contract which is involved.

I feel, under those circumstances, that we will be taking the time of a great many men here, and not only of counsel, but particularly this plant is in

crucial war industry, and [13] every man that is taken away to appear here on a proceeding where there is no jurisdiction will be taken away from the building of engines for war planes.

Trial Examiner Myers: You shouldn't have witnesses here that are not absolutely necessary. If you have any witnesses we will wait for the witnesses or we will go over to wherever the plant is and conduct a hearing near the plant.

What about this rider, Mr. Harrington?

Mr. Harrington: Well, the charge was filed before the complaint was entered into. Therefore, it was certainly within the three months period.

Trial Examiner Myers: You mean before the contract was entered into?

Mr. Harrington: Before the contract was entered into.

As to the word "complaint" the Comptroller General has ruled that complaint means charge. Here we had a charge that the company had dominated, originated and dominated the union. That charge was issued in May. So certainly this thing comes within the three months period.

Trial Examiner Myers: Do you have a copy of the Attorney General's opinion?

Mr. Harrington: No, I don't have. You mean the Comptroller General's ruling?

Trial Examiner Myers: Yes.

Mr. Harrington: No. [14]

Mr. Collins: Might I point this out to the Examiner: The charge could not possibly be directed to the contract that had not been entered into. In

other words, the domination could have entirely ceased. I think that we can indulge here in the presumption that there was no interference. I think any presumption is not orderly and usual procedure of business, so that the charge that was filed has absolutely nothing to do with the question of the contract. There is not even any charge that the contract arose out of any domination. There is not even any charge that the domination had not entirely ceased prior to the execution of the agreement.

So that we are here without any charges as to the validity or the effect of the domination as to the agreement which is complained of. And I can't believe that until I see that Comptroller General's opinion. I can't believe that under any law as applicable to this there might be something that has nothing to do with this, but when the statutes specifically refer to a complaint by the Board——

Trial Examiner Myers: Have you a copy of the Comptroller General's opinion in your office?

Mr. Proctor: For the purpose of the record I would like to make that motion my motion, as well.

Trial Examiner Myers: You mean you join with Mr. Collins in his motion; is that correct?

Mr. Proctor: That is right. [15]

Trial Examiner Myers: We will take a thirty minute recess at this time.

(Recess taken.)

Trial Examiner Myers: Are you ready, gentlemen?

Mr. Proctor: We are ready.

Mr. Harrington: The Board is ready.

Mr. Collins: If the Examiner please, there is certain language in the letter of the Comptroller General to the National Labor Relations Board that refers to the charge. I would say as far as he is concerned it apparently refers it back to the charge. Wouldn't you think so, Mr. Woollacott?

Mr. Woollacott: Yes.

Mr. Collins: However, the only two or three decisions which we have, of any court, upon the subject, and, after all, it would be the court's interpretation and not his, are based entirely upon the complaints which were filed prior to the amendment which we are relying on.

I don't see how any person could possibly read the language or how any court could read the language that we have in the law and construe it as being anything other than the complaint, which has a very designated meaning in this sort of procedure. And in all of the other references connected with the National Labor Relations Board, to the charge, it refers to the complaint issued by the Board. So the decisions we have now, none of them are in any way in point. [16] They have to do with complaint and proceedings that were instituted prior to the enactment of this amendment we referred to. This brief was in one of these cases, and that case itself had to do with the complaint which was instituted, filed by the National Labor Relations Board itself prior to the enactment of the Amendment we are relying upon.

I want to call your attention further, however, in this particular case that no charge was filed within the three months period at all, by anything, even a charge as to the contract which is involved. Now, to ignore that would be simply to say that this Act, which we rely upon, absolutely has no meaning; because it is very specific and even if you read the complaint as charged, where we have a contract, as we have here, it must apply to a charge that is involved and is addressed against the contract, because it says this:

“No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor, which has been in existence for three months or longer without the complaint being filed; * * *”

I don't see how you could possibly have jurisdiction in this particular case. Nothing has been shown or indicated to me that changes my thought or opinion on the subject. I earnestly urge this be dismissed. Certainly, I urge that we not be put to the cost and expense of this proceeding, and [17] particularly to the loss of production. You can see that by the number of men that are retained here until we have a ruling upon this particular case.

Trial Examiner Myers: Does anybody want to be heard in support of the motion?

Mr. Proctor: In behalf of Kinner Motors Employees' Association we adopt the statement of counsel for Kinner Motors, Inc., as our motion, and

wish to incorporate it as a part of a motion I would make.

Trial Examiner Myers: Does anybody else want to say anything in support of the motion?

Do you want to add anything, Mr. Harrington?

Mr. Harrington: All I would like to add, Mr. Examiner, is that the Comptroller General's ruling on it is very specific. The Comptroller General's ruling is binding on executive agencies and it is binding on this Board.

Under the Comptroller General's ruling this case clearly is a case in which a charge has been filed within the three months and, therefore, it does not come within the appropriation order.

I might state the rider has been passed on by three Circuit Courts of Appeals.

It has been passed on by the Fourth Circuit in the Baltimore Transit Company case; it has been passed on by the Second Circuit in the Elvine Knitting Mills case, and it has [18] been passed on by the Ninth Circuit in the Cowell-Portland Cement Company case.

In all those cases the Court ruled in accordance with the Board's contention as to the meaning of the Board's rider, and in accordance with the comptroller General's ruling.

Mr. Collins: Isn't it a fact that all those complaints and proceedings had been instituted prior to the passage of this Amendment?

Mr. Harrington: That is true in the Baltimore case. I don't know whether it is true in any of the other cases.

Mr. Collins: Isn't it a fact that in none of those cases was there a charge in relation to the contract, after the contract. For instance, in the one you are just referring to, the Elvine Knitting Mills case, it held, " * * * no bar to Board's order based upon findings that employer engaged in unfair labor practices in violation of Section 8 (1) and 8 (2) of National Labor Relations Act where Board's petition for enforcement was filed before passage of the appropriation statute * * *"

Those, you see, Mr. Examiner, do not apply to this particular situation that we have here.

We have a case here, and that is true of all of these, and even your own Reporter in analyzing——

Mr. Harrington: I might remark that is not our Reporter.

Mr. Collins: Whatever Reporter this is. [19]

Trial Examiner Myers: David Lawrence.

Mr. Harrington: Labor Relations Reporter.

Mr. Collins: It does not apply to the complaint stage. And all of those cases that have been decided have been, as far as I can find any language at all in them, absolutely not applicable to this. They are in connection with complaints filed prior to the passing of the statute.

Trial Examiner Myers: Another point in these cases cited by Mr. Harrington, the charge was filed more than three months after the making of the contract. In this case we have the making of the contract three months after the filing of the charge.

Mr. Harrington: Within three months of the

filing of the charge. The charge was filed in May, the contract was entered into in June.

Mr. Collins: The charge was filed before the making of the contract. The statute requires after making of the contract. You can't file an anticipatory action that isn't in any statute.

Mr. Harrington: The charge is directed towards domination and support of the Kinner Motors Employees Association, and that is what the charge is specifically directed to.

Now, the entering into a contract would be just another instance of domination and support. I might also add that when this contract was entered into both the Company and the [20] Association were under notice that the charge had been issued in respect to the Association. They entered into this contract with notice that the Board was proceeding in the matter.

Trial Examiner Myers: Does anybody else want to say anything either for or against the motion?

Mr. Collins: I have nothing further to say, except to repeat my request that this point be decided by formal order of the National Labor Relations Board before we be put to the expense of a trial.

Trial Examiner Myers: I will deny the motion to dismiss; that is, the motion to dismiss on the grounds that the rider to the Appropriation Bill is a bar to this proceeding.

If you want to take the matter up with the Board you may do so, either by 'phone or telegram. I won't suspend the hearing for the purpose of getting a decision, because we don't know when the

Board will have an opportunity to pass upon your application.

Mr. Collins: Then may the record show an exception and also any proceedings from here on are subject to our exception?

Trial Examiner Myers: Yes, sir. Are there any other objections?

Mr. Proctor: May that exception be taken on behalf of Kinner Motors Employees Association?

Trial Examiner Myers: I might say, reiterate that the [21] parties have an automatic exception to all my rulings, that is, they have exception to all the adverse rulings.

Mr. Collins: Then there is no necessity for us to enter an exception on the record.

Trial Examiner Myers: That is right. As I understand it, we will proceed with this hearing over your objection; is that right?

Mr. Collins: Right.

Mr. Proctor: Right. [22]

JACOB DONALD SALTER,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Jacob Donald Salter.

Trial Examiner Myers: Will you please spell your last name for the record?

The Witness: S-a-l-t-e-r.

(Testimony of Jacob Donald Salter.)

Trial Examiner Myers: Where do you live, Mr. Salter?

The Witness: 1815 Fourth Street, San Fernando, California.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Harrington.

Q. (By Mr. Harrington) By whom are you employed, Mr. Salter?

A. By Kinner Motors.

Q. How long have you been employed by Kinner Motors? A. About thirteen months.

Q. Are you acquainted with Mr. Bob Clark?

A. Yes, sir.

Q. What is Mr. Clark's business?

A. He was an organizer for 727, the I. A. M., International Association of Machinists. [24]

Q. When did you become acquainted with him?

A. When he first started passing handbills out in front of the gate of Kinner Motors in Glendale.

Q. When was that?

A. About the 1st of March.

Q. Of what year? A. Of this year.

Q. This year. Where is Mr. Clark now?

A. Mr. Clark is in the Army now. [25]

Q. (By Mr. Harrington) After Mr. Clark went to the Army, what was done in respect to the organizational work of the International Association of Machinists?

Mr. Proctor: I object to that on the ground it isn't material, has no bearing on any issue here. The question is whether or not there was domina-

(Testimony of Jacob Donald Salter.)

tion by Kinner Motors in regard to the formation of Kinner Motors Employees Association, Inc. It makes no difference what may have happened between members of the A. F. of L. and their solicitation of members.

Trial Examiner Myers: The objection is overruled.

Will the Reporter please read the question to the witness?

(The question was read.)

The Witness: It was taken over by Lodge 311 of the International Association of Machinists.

Trial Examiner Myers: Approximately when did Mr. Clark go into the Army?

The Witness: Well, about the—I would say the second week in March, somewhere along there.

Trial Examiner Myers: This year?

The Witness: Yes, sir.

Q. (By Mr. Harrington) Have you ever heard of an organiza- [26] tion called the Kinner Motors Employees Association? A. Yes, sir.

Q. When did you first hear of it?

A. Immediately after Bob Clark was passing handbills out in front of the gate at Kinner Motors, about a week or ten days.

Q. What activity of the Kinner Motors Employees Association happened at that time?

A. Pardon?

Q. You say you first became acquainted with the Kinner Motors Employees Association at that time. In what manner did you become acquainted with it?

A. There were notices that appeared on the bul-

(Testimony of Jacob Donald Salter.)

letin boards in both plants, both Plant 1 and Plant 2.

Q. What did the notices state?

A. I don't remember just exactly; notices of meetings and formation of the Kinner Motors Employees Association. [27]

(Thereupon, the documents referred to were marked as Board's Exhibits 3 and 4, for identification, and were received in evidence.)

BOARD'S EXHIBIT No. 3

(Copy)

Pearson & Proctor

Attorneys at Law

Suite 218 Security Bank Building

Burbank, California

CHarleston 6-4448

STanley 7-2488

Stanley G. Pearson

Marlan A. Proctor

May 1, 1943

Kinner Motors Company, Inc.

635 West Colorado Blvd.

Glendale, California

Gentlemen:

Re: Petition of Kinner Motors Employees Association, Inc., for recognition as sole bargaining agent

Kinner Motors Employees Association, Inc., a California non-profit corporation, as a representa-

(Testimony of Jacob Donald Salter.)

tive of the majority of the employees of Kinner Motors Company, Inc., under and by virtue of the provisions of the National Labor Relations Act, hereby petition you for and demand recognition forthwith as the exclusive bargaining agency for all of your employees which Kinner Motors Employees Association, Inc., may deem necessary or advisable.

The purpose of said bargaining agency is to afford your employees a means and method of collectively bargaining with you through representatives of their own choosing and to engage in concerted activities for their mutual aid and protection.

Accompanying this petition are a number of cards signed by your employees which evidences the fact that more than 50% of your employees have designated Kinner Motors Employees Association, Inc., as their exclusive bargaining agent. As soon as you have checked these cards against your payroll record for the purpose of ascertaining the authenticity thereof, said cards are to be returned to Kinner Motors Employees Association, Inc., forthwith, and in any event Kinner Motors Employees Association, Inc., reserves the right to secure possession of said cards upon demand.

Yours very truly,

PEARSON & PROCTOR

.....

By Marlan Proctor

Attorneys for Kinner Motors
Employees Association, Inc.

MAP:lr

(Testimony of Jacob Donald Salter.)

BOARD'S EXHIBIT No. 4

(Copy)

Kinner Motors Inc.
635 West Colorado Boulevard
Glendale, California, U. S. A.

May 7, 1943

Kinner Motors Employees Association, Inc.
912 East Glenoaks
Glendale, California

Attention: Mr. Robert L. Stevens, President.

Gentlemen:

The undersigned received your letter of May 1, 1943, and has now checked the cards signed by the employees of the undersigned. You are correct that these cards evidence the fact that more than fifty percent of our employees have designated Kinner Motors Employees Association, Inc. as their exclusive bargaining agent. It is our understanding that this compiles with the Wagner Act and the undersigned, therefore, recognizes Kinner Motors Employees Association, Inc. as the exclusive bargaining agent.

(Testimony of Jacob Donald Salter.)

We shall be very pleased to discuss any matters with your proper agent and representatives.

Very truly yours,

KINNER MOTORS, INC.

.....

Earl Herring,

President.

ERH :lo

cc: Pearson & Proctor, Attorneys.

JOHN WILLIAMS,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: John Williams.

Trial Examiner Myers: Will you spell your last name for the record?

The Witness: W-i-l-l-i-a-m-s. [29]

Trial Examiner Myers: Where do you live, Mr. Williams?

The Witness: 608 West Wilson, Glendale.

Trial Examiner Myers: You may proceed, Mr. Harrington.

Q. (By Mr. Harrington) By whom are you employed, Mr. Williams? A. Kinner Motors.

Q. How long have you been employed by Kinner Motors? A. Six years.

(Testimony of John Williams.)

Trial Examiner Myers: Can you hear Mr. Harrington?

The Witness: I can hear him if he talks a little bit louder.

Mr. Harrington: I can talk louder than that.

Q. (By Mr. Harrington) What type of work do you do in the plant?

A. Machinist, all kinds.

Q. What is your capacity? Do you have any title?

A. No, just a machinist, that is all.

Q. What type of work do you do?

A. All kinds pertaining to the machinist business.

Q. Who is your immediate superior?

A. Ed Davey.

Q. What is his title?

Trial Examiner Myers: Wait a minute. Ed who?

The Witness: Davey, D-a-v-e-y.

Trial Examiner Myers: Is that Edward Davey?

[30]

The Witness: That is right.

Trial Examiner Myers: Will the Reporter please read the last question?

(The question was read.)

The Witness: Works manager of Plant 1. [31]

Trial Examiner Myers: Very well, I will overrule the objection on Mr. Harrington's statement that it is leading up to the case in chief.

What work were you doing in October, 1942?

(Testimony of John Williams.)

The Witness: I think I was a leadman over the manufacture—over counterweights.

Q. (By Mr. Harrington) How long were you in that position? A. About five months.

Trial Examiner Myers: Let's get this straight. When did you first go with the company?

The Witness: Back in 1937.

Trial Examiner Myers: Now tell us all the jobs you held since 1937 up to date, if you can.

The Witness: Well, it has been every kind of a job pertaining to the manufacture of the Kinner Motors. [32]

Trial Examiner Myers: I don't mean the particular job. In October, 1942, you were a leadman?

The Witness: Yes.

Trial Examiner Myers: What did you do when you first came there, were you just a machinist?

The Witness: General Machinist.

Trial Examiner Myers: How long did you stay as a machinist?

The Witness: Until I took that there supervisor's job in October, September, somewhere in 1942.

Trial Examiner Myers: And when you say "that supervisor's job" you mean that leadman job?

The Witness: Yes, that is right.

Trial Examiner Myers: And you held that job for about five months; is that right?

The Witness: That is correct.

Trial Examiner Myers: Then what did you do after that?

(Testimony of John Williams.)

The Witness: Went back to the machine business.

Q. (By Mr. Harrington) When you say you held that job for about five months, can you place any closer the time when you ceased holding that job?

Trial Examiner Myers: As leadman?

Mr. Harrington: Yes, as leadman.

The Witness: I judge it was in the spring. I don't know exactly what the date was, or what month. [33]

Trial Examiner Myers: Can the parties stipulate when this witness was a leadman?

Mr. Collins: I don't know. I would have to check it up.

Trial Examiner Myers: Very well.

Mr. Collins: Do you know?

Mr. Proctor: No.

Q. (By Mr. Harrington) As leadman, what were your duties?

A. Set the machines up, see that the work was turning out all right.

Q. Did you have any employees under you?

A. I did.

Q. How many?

A. Oh, anywhere from eight to twelve at different times; sometimes as many as that and sometimes I only had two.

Q. What was your authority over those men?

A. Just to see they got the work out, and see I got the materials there for them to get it out.

(Testimony of John Williams.)

Q. Did you have any authority to hire?

A. I did not.

Q. Or to discharge?

A. No, I did not.

Q. Did you have authority to report on the workmanship of the employees under you, to Mr. Davey? A. Absolutely. [34]

Q. What wages did you receive while you were a leadman? A. Hourly wages?

Q. Yes. A. \$1.35 an hour.

Q. What did the men under you receive?

A. There was a variation there. I don't exactly know, because I am not acquainted with what the rate of pay is they pay their employees there.

Q. Was your rate of pay higher than the rate of pay of the men under you? A. It was.

Q. Could you approximate how much higher it was?

A. Oh, I should judge maybe I was getting about 25 cents an hour more than the highest paid one I had.

Mr. Collins: I move to strike that on the ground it is just guesswork. He has already stated he didn't know the other salaries.

Trial Examiner Myers: The motion is granted.

Now, what was your rate of pay before you became a leadman?

The Witness: \$1.30.

Q. (By Trial Examiner Myers) And what is your rate of pay now? A. \$1.40.

Q. Was there any increase, general increase, be-

(Testimony of John Williams.)

tween the [35] time that you became a leadman, some time in September or October and the present time? A. Yes.

Q. How much per hour? A. Five cents.

Q. When you ceased to be a leadman and became a machinist again—I am using your words——

A. Yes.

Q. ——what was your rate of pay?

A. The same; they never reduced my pay.

Trial Examiner Myers: Go ahead, Mr. Harrington.

Q. (By Mr. Harrington) Did you ever assign work to other leadmen?

A. No, —to other leadmen?

Q. Yes. A. I did not.

Q. Did you ever assign any work to be done on the Bullard machines in Plant No. 2?

A. I took it over there and, as a rule, I could get it done, yes. That was when they started up over there. I never—what word was that?

Q. Did you assign work?

A. No, I took it over there and had it done. I suppose you could call that assigning. I never had no authority. I took it there and asked them to get it done. [36]

Q. Who did you ask to get it done?

A. Whoever I—the superintendent over there or the man that had charge of the Bullards.

Q. Have you ever heard of an organization called Kinner Motors Employees Association?

A. I certainly have.

(Testimony of John Williams.)

Q. When did you first hear of it?

A. When I organized it.

Q. When did you organize it?

A. I don't know exactly the date, but I think it was back in last April, '42—'43, yes.

Q. April of 1943? A. Yes.

Q. How did you go about organizing it? Just tell the steps you took in organizing it.

A. Well, I thought it would be a fine thing that the employees all get together, it would be beneficial all the way around.

Q. What did you do about organizing it?

A. I felt out several other employees there and they thought the same thing.

Q. Who were the employees you felt out?

A. Pardon?

Trial Examiner Myers: What do you mean you "felt out"? Do you mean you spoke about it to them? [37]

The Witness: I did.

Trial Examiner Myers: All right.

Q. (By Mr. Harrington) Who did you speak to? A. Mr. Sharrar and Gilbert.

Trial Examiner Myers: Who are these people?

The Witness: Pardon?

Trial Examiner Myers: Who are these people, employees of the company?

The Witness: Employees of the company.

Q. (By Mr. Harrington) And after you discussed it with them, what did you do?

A. Well, I was notified about Mr. Proctor there, and so I went up to see him about it.

(Testimony of John Williams.)

Q. How were you notified about Mr. Proctor?

A. Talking about it up in the bowling alley one night, one Friday evening. I got to talking to some of the fellows up there from some other company. They said they had the same kind of a company, and they recommended Mr. Proctor to me as their attorney; so I went up to see him.

Q. Just a moment. You said that some other organization had the same kind of a company.

A. I don't know exactly whether——

Trial Examiner Myers: You mean a union?

The Witness: Yes.

Mr. Harrington: That is what I am getting at, Mr. [38] Examiner.

Q. (By Mr. Harrington) You testified that you discussed the organization of this association with Mr. Sharrar and Mr. Gilbert?

A. Yes.

Q. Can you relate what was—first, how many discussions did you have with them, Mr. Williams, about it?

A. Pardon? What was that?

Q. How many discussions did you have with Mr. Sharrar and Mr. Gilbert about forming the Association?

A. Oh, I don't suppose more than about two at the time, before I went up to see Mr. Proctor.

Q. What was said in those discussions?

A. They said they thought it would be all right.

Q. What did you say?

(Testimony of John Williams.)

A. I was the one that suggested it, and I thought it would be a fine thing for all the members to get together. It would bring a closed contact between the employees and the management.

Q. Was the International Association of Machinists intending to organize the plant at that time?

A. They were handing out handbills out at the gate, and also passing out cards in the shop.

Q. Now, you testified you went to see Mr. Proctor? A. Yes. [39]

Q. Can you place the date of that?

A. I know it was on a Saturday, that is all.

Trial Examiner Myers: Do you know what month it was?

The Witness: I think it was in April.

Trial Examiner Myers: This year?

The Witness: That is right.

Trial Examiner Myers: That is Mr. Marlan Proctor?

The Witness: Mr. Marlan Proctor over there (indicating). I think it was in April.

Q. Who was with you when you saw Mr. Proctor?

A. When I went to see Mr. Proctor I was alone.

Trial Examiner Myers: Can you fix what part of the month it was, whether it was the first part, middle or second part or third part?

The Witness: It may have been somewhere around the 20th of the month, I am not sure, though.

(Testimony of John Williams.)

Mr. Proctor: For the purpose of the record—I don't want to try to lead the gentleman—but the articles of incorporation were filed on April the 5th. His meetings, of necessity, had to be in March.

Mr. Harrington: Thank you.

The Witness: I didn't remember the dates of the month.

Trial Examiner Myers: Can the parties stipulate that this witness first saw Mr. Proctor, regarding the intervenor in this proceeding, sometime in the latter part of March? [40]

Mr. Collins: I will so stipulate.

Mr. Proctor: It was sometime in the early part of March.

Trial Examiner Myers: You fix the date.

Mr. Proctor: I can't fix the exact date. It was in the early part of March.

Trial Examiner Myers: Early part of March, 1943?

Mr. Proctor: Yes.

Trial Examiner Myers: Do you so stipulate, Mr. Harrington?

Mr. Harrington: Yes.

Trial Examiner Myers: And you, Mr. Collins?

Mr. Collins: Yes.

Trial Examiner Myers: Thank you, Mr. Proctor.

Q. (By Mr. Harrington): When you went to see Mr. Proctor, what conversation did you have with him?

A. I asked him all about what procedure to go

(Testimony of John Williams.)

through to form anything like this here. He advised me that the best thing would be to form a corporation, and I would have to get two others to form the corporation, which I did. We went back to see him on the following Monday; whatever date that was, I don't know.

Q. Who went with you on the following Monday?

A. Howard Sharrer and Orville Gilbert.

Q. What occurred at that time?

A. We took it up with Mr. Proctor to apply to Sacramento [41] for the papers for incorporation.

Q. Did you thereafter incorporate?

A. Mr. Proctor took it up and got the incorporated papers. [42]

Q. (By Mr. Harrington): Did you take any other steps at that time towards organizing this Association?

A. I don't know whether I—I don't remember whether I took any steps then until after it was incorporated. I am not so sure.

Q. Were any Association cards passed around among employees [43] at that time, around March 22nd?

A. No, we never had them printed at that time.

Q. When were cards printed?

A. Oh, I should judge that must have been about two weeks after that there, after we were notified they were sent away to be incorporated.

Q. That would be sometime in April?

A. That is right.

(Testimony of John Williams.)

Q. What occurred after you signed the articles of incorporation, as far as the organization of the Association was concerned?

A. Well, we had cards printed and distributed them amongst the employees and got their names in that was willing to join the Association.

Q. Were any meetings held around that time?

A. There wasn't any until we—we had several names, then I called a meeting.

Mr. Harrington: May it be stipulated by counsel for the company and counsel for the Association that——

Trial Examiner Myers: And by counsel for the Board?

Mr. Harrington: ——and by counsel for the Board, that the general meeting of the Association was held on April 16, 1943; that a second meeting was held on April 23, 1943; and that a meeting of the board of directors was held on April 30, 1943?

Mr. Proctor: I will so stipulate there were meetings [44] on those dates, and they were attended by me.

Trial Examiner Myers: Will you so stipulate?

Mr. Collins: I have no knowledge, naturally, as to the date of it. I have no objection to its going in.

Trial Examiner Myers: You have no stipulation, Mr. Harrington.

Mr. Collins: I will stipulate to it, that they were held at that time. My stipulation being based not on my own knowledge, but the statement of Mr. Proctor.

(Testimony of John Williams.)

Trial Examiner Myers: You will have to stipulate or he will have to prove it.

Mr. Collins: I will stipulate, but I want the record to show it is not based on any knowledge of my own or the company, but on Mr. Proctor's statement.

Mr. Harrington: So stipulated.

Trial Examiner Myers: The organization you refer to is the intervenor in this proceeding?

Mr. Harrington: I beg pardon?

Trial Examiner Myers: You were talking about certain meetings——

Mr. Harrington: Of the Kinner Motors Employees Association.

Trial Examiner Myers: Is that the thing you had in mind, Mr. Collins?

Mr. Collins: Yes. [45]

Trial Examiner Myers: And you, Mr. Proctor?

Mr. Proctor: Yes.

Q. (By Mr. Harrington): Who was chairman at the first meeting of the Association?

A. Mr. Stevens.

Q. Is that Mr. Robert Stevens?

A. Correct.

Q. How was he selected as chairman?

Trial Examiner Myers: Wait a minute. Who is Stevens?

The Witness: He is an employee.

Trial Examiner Myers: Of the Kinner Motors?

The Witness: Of the Kinner Motors, yes sir.

(Testimony of John Williams.)

Q. (By Mr. Harrington): Who selected him as chairman? A. I did.

Q. Beg pardon? A. I did.

Q. When? A. Just before the meeting.

Q. How long had Mr. Stevens been employed by the company?

A. Well, I think about, at that time he had been there about a month or six weeks.

Q. Why did you select him?

A. I was given to understand that he knew all the procedure about—how to carry on a meeting.

Q. Who gave you to understand that? [46]

A. Different fellows in the shop; that they knew him through these other affiliations.

Q. Can you name any of those persons?

A. I don't know offhand; that is a long time ago.

Q. And what led you to believe that he had experience in conducting meetings?

A. The way I heard about it was that he had experience with the American Legion and some other organizations, and he had experience and knew the formality of handling meetings that way. So I appointed him to hold the first meeting and then he was elected the following meetings.

Q. And he acted as chairman at the second meeting also? A. He did.

Q. Did you know Mr. Stevens before he came to work for the company? A. I did not.

Q. Are you at present a member of the Association? A. I am.

(Testimony of John Williams.)

Q. And have you been since its inception?

A. I have.

Q. Do you hold any office in the association?

A. Not at present, no.

Q. Did you hold any office at any time?

A. I did.

Q. What was that office? [47]

A. Director.

Q. When?

A. From the first election of officers until two weeks ago come tomorrow.

Q. And when was the first election of officers?

Trial Examiner Myers: He means what meeting. You had three meetings, as I understand. Is that right, three meetings?

Mr. Proctor: Two meetings and one of the board of directors, I may stipulate.

The Witness: I think that was the second meeting.

Mr. Harrington: Thank you.

Trial Examiner Myers: All right. And all the officers were selected at that meeting?

The Witness: That is right, sir.

Trial Examiner Myers: Where were these meetings held?

The Witness: The American Legion Hall.

Trial Examiner Myers: In Glendale?

The Witness: In Glendale.

Q. (By Mr. Harrington) As a member of the board of directors did you attend any meetings with

(Testimony of John Williams.)

the company at about that time, that is, after you were elected?

A. The agreement, when we signed the agreement, yes.

Q. I see. Did the company enter into a contract with the Association? [48]

A. They did.

Q. When?

A. I really don't know what date.

Trial Examiner Myers: Have you a copy of the contract?

Mr. Proctor: I think the contract speaks for itself.

Trial Examiner Myers: If you show a copy of the contract to the witness he might remember the date.

Mr. Harrington: May it be stipulated by counsel that Board's Exhibit 6, for identification, is an agreement between the Kinner Motors, Inc., and the Kinner Motors Employees Association, Inc.; that the effective date is June 16, 1943?

Mr. Proctor: So stipulated.

Mr. Collins: So stipulated.

Trial Examiner Myers: When was the contract signed, June 16, 1943?

Mr. Harrington: I was going to develop that later. I am not sure myself. My understanding is it was signed a day or so later.

Mr. Proctor: Mr. Stevens: says it was signed at 4:25 on June 16th. On the basis of his statement I will stipulate it was so signed.

Mr. Harrington: I will so stipulate.

(Testimony of John Williams.)

Mr. Proctor: I have forgotten.

Trial Examiner Myers: He said the effective date. [49]

Mr. Collins: I don't know whether it was dated or signed the 17th.

Trial Examiner Myers: Would you say on or about June 16, 1943?

Mr. Proctor: That is quite satisfactory.

Mr. Collins: That is satisfactory.

Mr. Harrington: I so stipulate.

Q. (By Mr. Harrington) Was this contract distributed to the employees? A. Pardon?

Q. Was the contract distributed to the employees? A. It was.

Q. When, do you know? [50]

A. That I couldn't tell. It was about a month afterwards, I think. It was a long time before we got the little pamphlets printed up. I wouldn't know exactly the date.

Q. In what manner was it distributed?

A. Distributed through the personnel department, as it is at the present time. Whenever an employee comes in they get a copy of this contract that is in force right at the present time.

Trial Examiner Myers: What do you mean? If an employee wants a copy of the contract, he goes to the personnel office?

The Witness: No, they give it to them, all the employees. At the time the contract came out it was distributed to each and every one of the employees

(Testimony of John Williams.)

of the firm. Any new employee that comes in now, as they get employed, they get a copy of that given to them.

Trial Examiner Myers: At the time this was distributed, how was it distributed? That is what Mr. Harrington asked you.

Mr. Harrington: Yes, that is my question.

The Witness: I think it comes through the personnel department, sent around to every man in the employ.

Trial Examiner Harrington: How did you get your copy?

The Witness: I guess I had mine given to me by someone from the personnel department.

Mr. Proctor: May I take this witness for just one [51] moment, your Honor?

Trial Examiner Myers: For what purpose?

Mr. Proctor: For the purpose of asking him whether or not it was true these contracts were handed out in the separate meetings of the union.

Trial Examiner Myers: You can bring that out on cross examination.

Mr. Proctor: I thought perhaps it would clarify the record.

Trial Examiner Myers: Did you hear Mr. Proctor's statement?

The Witness: He said something about a meeting.

Trial Examiner Myers: He says it is his recollection that copies of the contract were distributed

(Testimony of John Williams.)

at a meeting of the organization, that is, Kinner Motors Employees Association. Is that right?

The Witness: Maybe so; maybe I wasn't at that meeting.

Trial Examiner Myers: All right. Go ahead, Mr. Harrington.

Q. (By Mr. Harrington) But were copies distributed by the personnel office?

A. I know they have since. They get all employees as they come in, they give them a copy of this when they are employed.

Trial Examiner Myers: Well, I don't think you should follow that point up, because Article 12 provides how copies [52] of the contract should be distributed.

Mr. Harrington: May I see it?

Trial Examiner Myers: Yes.

Q. (By Mr. Harrington) I show you a blank application for membership, which is set out right inside the front cover of the contract,—

A. Yes.

Q. —do you know how that happened to become a part of the contract?

A. I do not. Well, that is the same—that is the copy of the first cards I had printed. That was before the agreement was made.

Trial Examiner Myers: I think you are a little wrong there. You said in the front of the booklet, which contains the contract, which is Board's Exhibit No. 6. I think you mean the back.

(Testimony of John Williams.)

Mr. Harrington: It is in the front of the copy I have.

Trial Examiner Myers: My copy has it in the back and your copy has it in the front.

Mr. Proctor: We will have to revise our stipulation.

Trial Examiner Myers: All right. You better make it "included in the booklet" which contains the contract.

Mr. Harrington: Yes, that would be better.

Q. (By Mr. Harrington) Do you know how the application for membership in Kinner Motors Employees Association, Inc., [53] which is included as part of Board's Exhibit 6, was inserted in Board's Exhibit 6?

A. I think that came in the agreement between the Association and Kinner Motors, Inc.

Q. Do you know what part of the agreement?

A. No, I don't know.

Q. Did you participate in negotiations between the company and the Association with respect to this contract? A. I did.

Q. Was anything mentioned about including an application for membership in copies of the contract?

A. Offhand I wouldn't remember.

Q. You don't remember anything being said about that? A. No.

Q. Who is the personnel director of the company?

Trial Examiner Myers: When?

(Testimony of John Williams.)

The Witness: Mr. Sullivan.

Trial Examiner Myers: Wait a minute.

Q. (By Mr. Harrington) How long has Mr. Sullivan been personnel director?

A. I judge about the last eighteen months, or something like that. I wouldn't know for sure.

Trial Examiner Myers: What is Mr. Sullivan's first name?

The Witness: That I don't know. [54]

Trial Examiner Myers: Very well, sir.

Mr. Harrington: Can we stipulate it is Mr. E. J. Sullivan? That Mr. E. J. Sullivan is personnel director of the company?

Mr. Collins: I don't remember the initials, myself. I think that is correct. I always call him Sully. It is like so many of those names, you forget the initials. I don't remember. I may have it in the file. I think it is E. J.

Trial Examiner Myers: Can you stipulate it is E. J. Sullivan?

Mr. Collins: I will so stipulate.

Mr. Proctor: On hearsay testimony I will so stipulate.

Mr. Harrington: We can get his name.

Mr. Proctor: I will stipulate.

Mr. Harrington: So stipulated.

Q. (By Mr. Harrington) Are you a stockholder in the company, Mr. Williams?

A. I am not.

Q. Have you ever been? A. No.

(Testimony of John Williams.)

Q. Do you have a relative working for the company? A. I have.

Q. Who? A. My son.

Q. What is his name? [55]

A. George Williams.

Q. What does he do?

A. He is chief inspector.

Trial Examiner Myers: What plant?

The Witness: Plant 1.

Trial Examiner Myers: Is that the plant you work in?

The Witness: Yes.

Mr. Harrington: May it be stipulated by counsel that the first president of the Association was Robert L. Stevens; that the vice president was Oscar Kastman; that the treasurer was Lynn Brown; that the board of directors were Walter E. Sigafosse, Jim Brown, Jack Williams, Walter Evers, Kenneth Enlows, Floyd Parr and Harry Brown?

Mr. Proctor: Those are all the names that were included in that list in the lower portion?

Mr. Harrington: Yes.

Mr. Proctor: So stipulated.

Mr. Collins: I have no actual knowledge of it. I will so stipulate.

Trial Examiner Myers: Those people signed this agreement on behalf of the Association didn't they?

Mr. Harrington: Yes.

Mr. Collins: I will so stipulate. I, of course,

(Testimony of John Williams.)

have no personal knowledge of it nor does the company. To save time I will so stipulate. [56]

Trial Examiner Myers: Will you so stipulate?

Mr. Proctor: Yes.

Trial Examiner Myers: You say Jack Williams. Is that the witness?

Mr. Harrington: I was just going to ask the witness.

Q. (By Mr. Harrington) Are you the Jack Williams mentioned in the contract?

A. Yes.

Mr. Proctor: You are also known as John Williams?

The Witness: Yes, Jack for short. [57]

Q. (By Mr. Harrington) Have any officials of the Association been promoted by the company since its formation? A. Yes.

Q. Who? Can you name them?

A. Howard Sharrar.

Q. What was he at the time the Association was formed? What was his position?

A. Machinist.

Q. What is his position now?

A. Night superintendent of Plant 2.

Trial Examiner Myers: When did he get that job, do you know?

The Witness: About two months ago.

Q. (By Mr. Harrington) What position did Mr. Sharrar hold in the Association?

A. What position?

(Testimony of John Williams.)

Q. Yes. A. Now?

Q. No. I asked you were any officials of the Association promoted, and you said Mr. Sharrar was. I am asking you what his position was.

A. I misunderstood you. He was not an official of the association.

Trial Examiner Myers: Just one of the incorporators, is that right? [59]

The Witness: Yes, —well, he was elected in office, but he only held the office for about three months, I think, and resigned.

Q. (By Mr. Harrington) What office was he elected to? A. Director.

Q. He was a member of the board of directors for about three months?

A. Yes; board of directors.

Q. Over what period of time was he a member of the board of directors?

A. From the inception until about—he held it for about three months.

Q. That would bring it up to June or July? Or can you place it any closer than you have?

A. It would be later than that, because the election was—he hadn't held the position in the Association for the last three months, or over. [60]

Mr. Harrington: I would like to recall Mr. Williams for one or two questions.

Trial Examiner Myers: Will you take the stand, please, Mr. Williams?

JOHN WILLIAMS,

a witness called by and on behalf of the National Labor Relations Board, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination

Q. (By Mr. Harrington) Mr. Williams, were you the leadman in March and April of this year?

A. I think so.

Mr. Harrington: I have no further questions.

Trial Examiner Myers: Are there any other questions, gentlemen?

Cross Examination

Q. (By Mr. Proctor) March and April of 1943? A. Yes.

Q. Did you think you were a leadman at the time this organization was first formed? When you first came to my [97] office were you a leadman or had you been reduced in rank, as it was?

A. I think I was.

Q. You think you were a leadman?

A. Yes.

Mr. Proctor: That is all.

Mr. Harrington: I have no further questions.

ORVILLE GILBERT,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Orville Gilbert.

Trial Examiner Myers: Will you please spell your entire name for the record?

The Witness: O-r-v-i-l-l-e G-i-l-b-e-r-t.

Trial Examiner Myers: Where do you live, Mr. Gilbert?

The Witness: 1267 Sonora, Glendale.

Trial Examiner Myers: You may be seated.

You may proceed, Mr. Harrington. [98]

Q. (By Mr. Harrington) Are you employed by Kinner Motors? A. Yes.

Q. How long have you been employed by Kinner Motors? A. Nine years.

Q. What position did you hold in the plant in January of 1943? A. Leadman.

Q. How long were you a leadman?

A. Before January?

Q. No, after January.

A. Up to the present time, right now; I am still a leadman.

Q. As a leadman, what are your duties?

A. Just the same—seeing that the work is carried out all right. Help the men get started.

Q. How many men do you have under you?

A. I imagine about twelve.

(Testimony of Orville Gilbert.)

Q. Have you had that many men under you all this year?

A. No, it has increased about three or four in the last couple of months.

Q. Do you do any manual work or labor, yourself? A. Not very much, no.

Q. What are your wages? A. Per hour?

Q. Yes. A. \$1.40. [99]

Q. (By Trial Examiner Myers) When you say you don't do much manual work, what do you mean by that?

A. If a fellow has a breakdown, or something, he comes to me and I help him get started; just a little repair job.

Q. Otherwise, what do you do?

A. I am just a leadman. I see that everything is going all right.

Q. What do you do? I have never been out to the plant and I haven't the slightest idea what you do.

A. I am leadman over the Bullards. There are eleven Bullards and three multimatics. And I just help these men get started, keep the work to them, that is all.

Q. Well, tell us just what you do. You work eight hours a day? A. Ten.

Q. All right. Can you tell us what you do in an average day?

A. You mean how much work—

Q. When you go to the plant tell us from the

(Testimony of Orville Gilbert.)

very time you walk into the plant up to the time you leave for the day what you do.

A. I go in and ring in, just like anybody else. I ring my time card in. I ring my time card in and I work on a job just like the same as any of the production men there; that is all. I walk around and see the fellows get started on time [100] and if they have any trouble they usually come to me and ask me this or that, or what I want done next, or what they are supposed to do next.

Q. What do you say?

A. I tell them what to do. I tell them what is to be done next, that is all.

Q. Have you any authority to hire anyone?

A. No, sir.

Q. Or to fire anyone? A. No, sir.

Q. Who has that authority?

A. Mr. Burland, I imagine, would be the one to fire them; but the personnel takes care of all hiring.

Q. Who is Mr. Burland?

A. He is assistant works manager, Plant 2.

Q. Do you work at Plant 2? A. Yes.

Q. Did you ever work at Plant 1?

A. Yes, sir.

Q. And when did you work at Plant 1?

A. Up until about October or November of 1942.

Q. Then you were transferred?

A. To Plant 2, yes, sir.

Q. Have you any power or authority to recommend the discharge of anyone? [101]

(Testimony of Orville Gilbert.)

A. Yes, if they don't happen to do their work right I tell Mr. Burland he is not producing what he should, something to that effect, he is not doing right.

Q. You mean a certain employee is not producing—— A. Yes.

Q. ——as much as he should? A. Yes, sir.

Q. Then what happens?

A. Mr. Burland takes care of the rest.

Q. In what way?

A. If he thinks—he uses his own judgment. If he thinks he ought to be fired, he will fire him.

Q. And have you ever recommended anybody for discharge?

A. Not particularly discharge. I recommended two that weren't doing the right thing.

Q. What happened? A. They let them go.

Q. You mean they discharged them?

A. Yes, sir.

Q. Do you assign any work to anybody?

A. Yes.

Q. In what way?

A. That is all, if there is a particular job that is finished on one machine and ready for another machine, why, I see that the other machine does it.

[102]

Q. Do you tell the employees to go from one job to another? A. That is right, yes sir.

Q. And do they report to you at any time, that is, the employees, about the condition of the job; that the job is finished?

(Testimony of Orville Gilbert.)

A. Oh, yes, yes. If it is not working right they come and tell me about it.

Q. Then what do you do?

A. If it is something wrong, something wrong with a particular casting I try to find out what is the matter. Or if something is wrong with the tools they are working with I try to find out what is the matter with them.

Q. When the job is finished, what happens?

A. It is passed on to the next machine.

Q. Have you ever recommended anybody for a change of job, from one job to another?

A. No, no sir.

Q. You say you have two kinds of employees working for you?

A. Well, there are two different kinds of machines, multimatic is a different kind of machine—made by the same company, but they are an automatic machine.

Q. Do you change some of the employees from one machine to another, from time to time?

A. Yes.

Q. In your discretion?

A. Well, if there is a particular job to be done they are [103] in a hurry for on this machine, why, yes, I can change them over to that machine.

Q. You can take a man off one job and put him on another?

A. Yes, sir.

Q. Who is your immediate superior?

A. Mr. Burland.

(Testimony of Orville Gilbert.)

Q. How long has he been your immediate superior?

A. Ever since I have been at Plant 2, since October—October or November of 1942.

Trial Examiner Myers: Go ahead, Mr. Harrington.

Q. (By Mr. Harrington): I believe I asked you what your wages, your hourly rate was.

A. Yes sir; \$1.40.

Q. What is the top rate of the men under you?

A. I don't know for sure, but I think it is \$1.30.

Q. I believe you testified about George Burland. Is he your immediate superior?

A. Well, now, within the last couple of weeks there has been a superintendent, day superintendent on Plant 1, so I suppose he would be my immediate——

Trial Examiner Myers: Plant 1?

The Witness: Plant 2; I am sorry.

Q. (By Mr. Harrington): Until two or three weeks ago was there anyone between you and George Burland? A. No, sir. [104]

Q. How many workers are there in Plant 2?

A. I imagine about 200, as close as I can guess.

Q. Is Burland over those 200?

A. Yes, sir.

Q. Does Burland come around every day and watch the men at their work?

A. Oh, sometimes, yes, to see what they are doing.

(Testimony of Orville Gilbert.)

Q. Have you ever recommended wage increases for men under you?

A. Yes, once or twice.

Trial Examiner Myers: What happened?

The Witness: One case it went through all right; another case it didn't.

Q. (By Mr. Harrington): Are you acquainted with the Kinner Motors Employees Association?

A. Yes, sir.

Q. When did you first become acquainted with it?

A. I should imagine February or March, 1943.

Q. Were you one of the incorporators of that Association? A. Yes, sir.

Q. What was your purpose in helping to start the Association?

A. Just to get something started that we could deal with the company with.

Q. Do you know Robert Stevens? [105]

A. Yes.

Q. Do you know how he became chairman of the first meeting?

A. No, I can't really say that I know right off-hand. No, I don't know.

Q. Have you held any office in the Association since its incorporation? A. No, sir.

Q. Are you still a member of it?

A. No, sir.

Q. When did you cease being a member?

A. The fact is I never was a member.

Q. You never joined it? A. No, sir.

(Testimony of Orville Gilbert.)

Trial Examiner Myers: You incorporated it, but you never joined it?

The Witness: That is right.

Trial Examiner Myers: Why?

The Witness: Because I thought—I was an old man and I thought if I would get in there some of the newer employees would think I was trying to run the outfit, run the union, so I never joined.

Q. (By Mr. Harrington): What position do you have in the plant today? A. Leadman.

Q. You are still leadman? [106]

A. Yes, sir.

Q. Have you had any promotions within the last two or three months? A. No, sir.

Q. Did you participate in any way in negotiating the contract between the company and the Association? A. No, sir.

Q. Did you attend any meetings?

A. With the company?

Q. Yes. A. No, sir.

Trial Examiner Myers: Did you attend any union meetings?

The Witness: No, sir.

Q. (By Mr. Harrington): Mr. Gilbert, do you know anything about this application for membership in the Association, which is a part of the contract? A. No, I don't.

Q. You don't know anything about it?

A. No.

Q. Did you attend the meetings between Mr. Williams and Mr. Proctor? A. Yes, sir.

(Testimony of Orville Gilbert.)

Q. When the Association was incorporated?

A. Yes, sir.

Q. And you signed the articles of incorporation?
[107]

A. Yes, sir.

HOWARD SHARRAR,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Howard Sharrar.

Trial Examiner Myers: Will you please spell your last name for the record?

The Witness: S-h-a-r-r-a-r.

Trial Examiner Myers: And where do you live?

The Witness: 1021 San Rafael, Glendale.

Trial Examiner Myers: You may be seated.

You may proceed, Mr. Harrington.

Q. (By Mr. Harrington): Are you employed by Kinner Motors, Inc.?

A. That is right.

Q. How long have you been employed?

A. Four years.

Q. What work do you do in the plant?

Mr. Proctor: I object to that on the ground it has no proper foundation.

Trial Examiner Myers: The objection is overruled. [120]

(Testimony of Howard Sharrar.)

The Witness: At what time?

Trial Examiner Myers: What work do you do at the plant? That means at the present time.

The Witness: At the present time I am the night superintendent.

Q. (By Mr. Harrington) And what were you doing in March of 1943?

A. Primary machine setup man.

Q. Were you a leadman at that time?

A. No.

Q. How long had you been doing that machine setup work?

A. I had been doing that machine setup work up until about six weeks ago.

Q. Who was your immediate superior in March of this year? A. In March of this year?

Q. Yes.

A. My immediate superior at that time was a fellow by the name of Ira Hutchins.

Trial Examiner Myers: What plant did you work in?

The Witness: Plant 2.

Q. (By Mr. Harrington) What rate of pay did you start at? A. At that date——

Q. No, when you started to work.

A. When I started? 90 cents.

Q. What rate of pay were you getting in March of this year? [121] A. \$1.15.

Trial Examiner Myers: Per hour?

The Witness: Per hour.

(Testimony of Howard Sharrar.)

Q. (Mr. Harrington) And what were you classified when you were getting \$1.15 an hour?

A. I was classified as toolmaker. [122]

Q. (By Mr. Harrington) Mr. Sharrar, do you recall making an affidavit in this case in September?

A. I do.

Q. Do you recall in that affidavit saying you were a leadman?

A. No, I don't recall stating that.

Q. Is that your signature (indicating)?

A. That is right.

Q. Is this correct, Mr. Sharrar,

"I started working for Kinner Motors, Inc., Glendale, on or about August 1, 1941. When I started my job was to make the crankshafts ready for final inspection."

A. That is right.

Q. (Reading) "Ed Davey, who was then shop foreman, was my immediate superior. I believe I started at 85 cents per hour and received periodic raises until Plant No. 2 was built, and then I went into No. 2 at \$1.10 per hour. I came into Plant No. 2 shortly after it was built last year, but I cannot recall now just what month that was. For several weeks then I was an ordinary worker in the tool-room. Then I was made a leadman and at that time I was raised to \$1.15 per hour." [124]

Is that correct? A. That is correct.

Q. You made that statement?

A. That statement, yes.

(Testimony of Howard Sharrar.)

Mr. Proctor: I think we should have an opportunity to go see that before he is cross-examined on it, or examined on it.

Mr. Harrington: I haven't had it marked for identification. I wasn't introducing it in evidence, I was merely attempting to——

Mr. Proctor: It is being used for the purpose of impeachment and I don't think that you can use it until counsel has seen it. I move all the testimony given in that regard so far be stricken.

Trial Examiner Myers: Show it to the counsel. The motion to strike is denied.

Q. (By Mr. Harrington) Is it true then, Mr. Sharrar, you were leadman?

A. No one had told me whether it was leadman. I was all over. I wasn't in charge of any one at all.

Q. Were there any employees under you?

A. No. The only thing I had to do was just set up, primary setup on that and turn it over to the leadman.

Q. I read further from your affidavit:

"I held this job as leadman for six or seven months. During this period there were eighteen or twenty men [125] under me, and they operated milling machines, shapers, jig boreers, grinders, engine lathes, and drill presses, that is, all the machinery in the 'toolroom' of Plant No. 2."

A. That is right. My job was to explain the prints on the new setup on there. I was responsible for the prints, so they got the work out.

(Testimony of Howard Sharrar.)

Q. What did you mean when you stated there were eighteen or twenty men under you?

A. I was to get the prints to them, explain the job to them, and see that the stock was there.

Trial Examiner Myers: What else?

The Witness: See that the stock was there so they could do the work.

Q. (By Trial Examiner Myers) And what else did you do? A. I would go from man to man.

Q. And if the stock wasn't there, what would you do? A. I would go cut the stock.

Q. Cut the stock? A. Yes.

Q. And give it to the men?

A. That is right.

Q. And then what happened?

A. Then I would go on to the next fellow and get his print and cut more stock, if he needed it. [126]

Q. Until all the men had enough stock?

A. That is right. And as they run out I would give them other jobs.

Q. When they finished with one job, what would happen?

A. I would be right there to get them another.

Q. You gave them another one? A. Yes.

Q. You kept on giving them jobs?

A. I kept on going around all the time.

Q. Seeing that they were doing the job?

A. No, that wasn't my duty, to see that they were doing the job. My duty was to see they had the print, and if they were in trouble on prints to explain it to them and see they had the stock.

(Testimony of Howard Sharrar.)

Q. Did you have any leadmen in your department? A. Hutchins was the foreman.

Q. I mean in March, 1943.

A. No, Mr. Hutchins was the foreman and I was acting under him, to keep the men busy; helping him, in other words.

Q. You didn't have any leadmen at that time?

A. No.

Q. How many men were in that department?

A. There were about eighteen or twenty at that time.

Q. Where would Hutchins be, right in that department all the time? [127]

A. He would be right in that department all the time.

Q. What was his title?

A. He was foreman.

Q. Of what department? A. Toolroom.

Q. And he would see that you did your work?

A. That is right.

Q. And see that the other men did their work?

A. That is right.

Q. Was he there all the time for eight hours?

A. Ten hours.

Q. Ten hours? A. Yes.

Q. He was there all the time? A. Yes.

Q. Excepting when he was out for lunch?

A. Yes.

Q. Was all the department gone to lunch at one time? A. That is right.

Q. Did it ever happen that he was away from the plant while you were working in there?

(Testimony of Howard Sharrar.)

A. Not for any longer time than just a few minutes.

Q. I mean for a day. A. Oh, no.

Q. Was he out sick? A. No. [128]

Q. Did he take a vacation at all?

A. Not during that time, no.

Q. Well, how long have you been holding that job you were just telling me about, setup?

A. That job there, I held that, oh, six or eight months, something like that.

Q. When did you first get it, did you say?

A. Along in the fall of the year, it was before Christmas, about a month or two before Christmas.

Q. 1942? A. That is right.

Q. You held that up to how long?

A. That job, that particular job was held up for about six or eight months. Then I went out on the main floor out in the shop and set up the new machines as they come in and turned them over——

Q. When you were in this toolroom department, did Hutchins ever take a vacation?

A. He took a vacation, yes.

Q. Who took his place when he was gone?

A. A fellow by the name of Cliff Malamphi.

Q. What was his job before he took Hutchins' place?

A. He was over in Plant 1. He was in the toolroom there doing about the same type of job I was doing in Plant 2.

Q. He came over? [129] A. Yes.

(Testimony of Howard Sharrar.)

Q. Where were you when Hutchins was on his vacation? A. I was there in the toolroom.

Q. And this man was doing the same work over in Plant 2 that you had been doing in Plant 1?

A. That is right.

Q. Did you stay where you were in Plant 1?

A. Yes, that is right.

Q. How long was Hutchins away?

A. A week.

Q. When was that, do you know?

A. I don't remember.

Q. In the fall, spring, was it?

A. It was in the fall. It was just shortly after we had gone over there in the new plant.

Trial Examiner Myers: Go ahead, Mr. Harrington.

Q. (By Mr. Harrington): Did you do any manual work yourself on production while you held that job? A. While I was in the toolroom?

Q. Yes. A. Not on production, no.

Q. Did you have any authority to recommend transfer of employees? A. No.

Q. Did you recommend any wage increases?

[130]

A. No.

Q. After you ceased holding that job, what did you do? A. In the toolroom?

Q. Yes.

A. I went out on the production floor.

Q. (By Trial Examiner Myers): What was

(Testimony of Howard Sharrar.)

the type of that job that you had in the toolroom, if there was any title to it?

A. I don't think there was any title to it, only just as I told you it was more or less leadman instructing men how to do the work. But as far as authority was concerned, there wasn't any.

Q. Did you have a timecard? A. Yes, sir.

Q. Was there anything on that timecard that designated what your job was? A. No, sir.

Q. Did your job have a name or anything like that? A. No.

Q. (By Mr. Harrington): Are you acquainted with the Kinner Motors Employees Association?

A. Yes, sir.

Q. When did you first hear of it?

A. About the 17th, 15th or 17th or 20th, somewhere along in there, in March.

Q. Who did you first hear of it from? [131]

A. Mr. Williams.

Trial Examiner Myers: John Williams?

The Witness: John Williams.

Q. (By Mr. Harrington): And what did Mr. Williams tell you about it at that time?

A. Well, all he said was he thought it would be a good plan to form an organization of our own as sole bargaining agent for the employees of Kinner, to bargain with the management of Kinner's.

Q. Did you take any further steps towards the organization of the Association? A. Yes.

Q. Were you one of the incorporators?

A. Yes, sir.

(Testimony of Howard Sharrar.)

Q. Did you circulate any membership cards for the Association, among the employees?

A. Yes, sir.

Q. When did you do this?

A. Well, I give some of the employees some of the cards at the bowling alley, some I gave during the smoking period and I gave different ones a group of cards. I think I give to five or six fellows.

Q. Did you circulate any in the plant?

A. In the plant? No, sir.

Trial Examiner Myers: Except during smoking hours? [132]

The Witness: That wasn't in the plant at that time, it was outside.

Q. (By Mr. Harrington): What is the smoking period you refer to?

A. The smoking period in the morning is 10:30, I believe, and 2:30 in the afternoon.

Q. Is that a rest period?

Trial Examiner Myers: You have to stay on the premises, don't you?

The Witness: They don't have to, no sir.

Trial Examiner Myers: They can go outside the gates?

The Witness: Yes.

Trial Examiner Myers: Where did you go with these cards, outside the gates?

The Witness: No, sir.

Trial Examiner Myers: Inside the gates?

The Witness: Yes, sir.

(Testimony of Howard Sharrar.)

Trial Examiner Myers: But not in the plant itself?

The Witness: Not in the plant itself.

Trial Examiner Myers: It was on the grounds?

The Witness: Yes.

Q. (By Mr. Harrington): Did you attend the first meeting of the Association?

A. Yes.

Q. Who was chairman of that meeting? [133]

A. Bob Stevens was acting chairman.

Q. How did he come to be elected as acting chairman?

A. Mr. Gilbert and I talked it over and decided to appoint him in—with Mr. Williams.

Q. Did you have anything else to do with his selection? A. Anything else, other than that?

Q. Yes. A. No, sir.

Q. Are you still a member of the Association?

A. No, sir.

Q. When did you cease being a member?

A. About two months ago.

Q. Are you the Howard Sharrar who is one of the incorporators of the Association?

A. Yes, sir.

Q. Did you hold any other office in the Association?

A. Yes, I was one of the members of the Board of Directors.

Q. Over what period of time?

A. For about two weeks.

Q. What two weeks was that?

(Testimony of Howard Sharrar.)

A. That was in the last two months, it was about—let's see——

Trial Examiner Myers: The last two months you were a member of the Association, is that what you mean?

The Witness: Yes, sir. [134]

Q. (By Mr. Harrington): Could you place more closely what that month would be? You said you have not been a member for two months. Was it immediately prior to that that you were a member of the Board of Directors?

A. Yes, it was before I was promoted as plant superintendent. I resigned about a week before that.

Q. Did you ever take the place of Floyd Drake?

A. Yes, sir.

Q. What was his position?

A. His position was night leadman, or foreman, you would call it. He was never listed as a foreman. He was directly under Ira Hutchins, the toolroom foreman.

Q. What happened? How did you come to take his place? A. He was sick.

Q. When was this? A. I do not remember.

Q. Can you place it by the month, what month it was in? A. No.

Q. Or what time of the year?

A. It was along, I think, sometime in April.

Trial Examiner Myers: This year?

The Witness: Of '43, yes, sir.

(Testimony of Howard Sharrar.)

Q. (By Mr. Harrington) Do you know what Floyd Drake's duties were?

A. His duties were giving the men their jobs and assisting [135] them on them, and telling them what to do on the jobs, as to how to do it.

Trial Examiner Myers: Toolroom?

The Witness: Toolroom, yes, sir.

Q. (By Mr. Harrington) Were there any lead-man under him? A. No, sir.

Q. At the time you held this position, were there any leadmen under him? A. No, sir.

Q. How many men were under you during those two weeks?

A. I think there were about eight.

Trial Examiner Myers: You say he was away for two weeks, or one week?

The Witness: Mr. Drake?

Trial Examiner Myers: Yes.

The Witness: He was off a week.

Q. (By Mr. Harrington) What position do you have now in the plant, did you say?

A. Superintendent nights.

Trial Examiner Myers: Superintendent of the Plant No. 2?

Q. (By Mr. Harrington) Night superintendent? A. Yes.

Q. Do you have authority to hire and discharge?

A. I have no authority to hire, and I have no authority to discharge; it is only on recommendation to Mr. Burland. [136]

(Testimony of Howard Sharrar.)

Q. You have authority to make recommendations? A. That is right.

Trial Examiner Myers: Burland is over you, then?

The Witness: Burland is directly over me, yes, sir.

Trial Examiner Myers: Is he the man that is there during the day?

The Witness: He is there during the day.

Q. (By Mr. Harrington) Were you a member of the Association at the time you were appointed night superintendent?

A. No, sir, I had resigned a week before that.

Q. What were the circumstances of your resignation? Had anyone told you to resign?

A. No, sir.

Mr. Proctor: I object to that on the ground it is immaterial. It has no bearing on the issues here.

Trial Examiner Myers: The objection is overruled.

Q. (By Mr. Harrington) Had anything been said to you by anybody in the plant about resigning?

A. No one had said anything about resigning at all.

Trial Examiner Myers: Why did you resign?

The Witness: Well, I read the handwriting on the wall, so to speak; no one said anything at all.

Trial Examiner Myers: You mean you expected to be promoted to the job of night superintendent?

The Witness: That is right. [137]

(Testimony of Howard Sharrar.)

Trial Examiner Myers: There was some talk between you and somebody connected with the management; is that right?

The Witness: No, sir, not with the management. It was by a couple of ordinary workmen that were out on the floor that tipped me off. They thought it was well, that better things were in store if I resigned. I said, "All right. I will resign and play, and see if it is going to prove out." I did and it proved out as it had.

Q. (By Mr. Harrington) Who were these workmen? A. I don't remember.

Trial Examiner Myers: What is it?

The Witness: I don't remember who it was.

Trial Examiner Myers: Two workmen came around and told you if you got out of the Association you might be promoted?

The Witness: That is right.

Trial Examiner Myers: You don't know who that was?

The Witness: No, sir.

Q. (By Mr. Harrington) Do you recall what you said to them or what they said to you?

Mr. Proctor: I object to that, I can't see any basis for it.

Trial Examiner Myers: I will sustain the objection.

Mr. Proctor: I also move all that testimony be stricken.

Trial Examiner Myers: The motion is denied.

(Testimony of Howard Sharrar.)

Q. (By Mr. Harrington) Have any other officials of the Association been promoted?

A. No.

Q. Did you have anything to do with the negotiating of this contract (indicating), Board's Exhibit 6?

A. The only thing I know about the contract is that Mr. Proctor wrote up a form whereby we could look it over, the three of us, at the time of organizing. Then after the organization was accepted, then it was brought up as it has been mentioned before. I don't recall just exactly—I didn't play much of an active part in that at all.

Q. Do you know anything about this application for membership in the Association which is in this contract (indicating)?

A. Do I know anything about the application?

Q. Yes. How it came to be in this contract.

A. How it came to be in that book?

Q. Yes. A. No, sir.

Q. At the time these two employees spoke to you or gave you a tip about being promoted, was there any mention made of Article 18 of the constitution?

A. No, sir. I couldn't even tell you what it is, unless I read it.

Q. Was there any discussion with respect to that?

A. After I turned in my resignation? [139]

Q. No. When you were talking to these two employees? A. No, sir.

(Testimony of Howard Sharrar.)

Q. What was your position immediately before
*you were promoted to night superintendent?

A. Primary machine setup man for new machines. [140]

ROBERT L. STEVENS,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Robert L. Stevens.

Trial Examiner Myers: Will you please spell your last name for the record?

The Witness: S-t-e-v-e-n-s.

Trial Examiner Myers: Where do you live?

The Witness: 912 East Glenoaks Boulevard, Glendale.

Trial Examiner Myers: You may be seated. You may proceed, Mr. Harrington.

Q. (By Mr. Harrington) Are you employed by Kinner Motors Corporation? A. Yes.

Q. How long have you been employed?

A. Since March 7, 1943. [144]

Q. What type of work did you perform when you first started working for the company?

A. Receiving clerk.

Q. Who was your immediate superior?

A. Joe Morrow.

(Testimony of Robert L. Stevens.)

Q. What is his title?

A. He is a receiving clerk, also.

Q. Did you continue to work as a clerk in the receiving department under Morrow?

A. Yes, sir.

Q. Have you been doing that work ever since?

A. Yes, sir.

Q. Did you ever take over Morrow's duties?

A. Yes, sir, I took over Morrow's duties on May 1, 1943.

Q. What happened to Morrow?

A. He went up as purchasing agent, front office.

Q. Was your salary increased when you took over his job? A. Yes, sir.

Q. Did you have any title then?

A. No, sir, still receiving clerk.

Q. Still receiving clerk, but you were performing his duties? A. That is right.

Q. (By Trial Examiner Myers) What did you start at, what salary? [145]

A. I started at 75 cents an hour.

Q. When you filled Morrow's job, what did you receive? A. 90 cents.

Q. Did you get any increases between those dates? A. Yes, sir, one 5 cent raise.

Q. That is 80 cents? A. That is right.

Q. First you started at 75 cents. When were you raised to 80 cents?

A. In about thirty days.

Q. And then some time around May 1st you got—— A. 90 cents.

(Testimony of Robert L. Stevens.)

Q. —90 cents? A. Yes.

Q. What are you getting now? A. \$1.00.

Q. Have you had any raises in between 90 cents and \$1.00? A. Yes, sir; 5 cents.

Q. When did you get that?

A. Got that when certain fellows in the receiving department put in a complaint as to their salaries.

Q. Everybody got an increase of 5 cents an hour? A. That is right.

Q. Where did you work before you went with the Kinner Motors?

A. Goodyear Tire and Rubber. [146]

Q. How long did you work there?

A. Seven months.

Q. What was your job there?

A. Accounts payable.

Q. A bookkeeping job? A. Yes, sir.

Q. Where did you work before you worked for Goodyear?

A. The County of Los Angeles, financial investigator.

Q. How long did you hold that job?

A. Three and a half years.

Q. And this Goodyear plant is right near Los Angeles?

A. It is at 6701 South Central.

Q. In Los Angeles? A. That is right.

Trial Examiner Myers: Go ahead, Mr. Harrington.

Q. (By Mr. Harrington) When you took over

(Testimony of Robert L. Stevens.)

Morrow's duties, were you then in charge of receiving?

A. Only as far as to seeing that the goods were properly received and shipped out.

Q. Did you supervise the work of any employees? A. Yes, sir.

Q. How many? A. Three.

Q. Are three employees all you have had under you since then? Are they still there? [147]

A. That is all.

Q. Have you ever had any more employees?

A. No, sir.

Q. Did you have anything to do with the Brand Street warehouse of the company?

A. Yes, sir.

Q. How many employees are working there?

A. Well, at the present time there is only one in charge, but that was only to—we had a cancellation, an Army cancellation order which had to be shipped over there for the Army to check. I was put in charge, to see that the raw materials and stocks were shipped to Brand Boulevard.

Q. And were the employees in that warehouse under your supervision at that time?

A. Only the mover.

Q. How many of them were there?

A. About three or four.

Q. That was in addition to the employees in the receiving department? A. That is right.

Q. Who is your immediate superior?

A. At that time Mr. George Blauvalt.

(Testimony of Robert L. Stevens.)

Q. What is his title?

A. He is parts manager.

Trial Examiner Myers: You said "at that time".
What [148] time are you referring to?

The Witness: Just a month ago they had a shakeup.

Trial Examiner Myers: You say at that time.
What time are you referring to?

The Witness: I am referring up until a month ago.

Trial Examiner Myers: From May 1st—

The Witness: No, from the time of April—let's see, March 7th until a month ago.

Q. (By Mr. Harrington) When did you first hear of the Kinner Motors Employees Association?

A. When Mr. Howard Sharrar and Mr. Jack Williams spoke to me about it.

Q. When was that?

A. That was one evening, I believe, at the bowling alley on Friday night when they met to bowl.

Q. And what conversation did they have with you about it?

A. Well, it seems as though somebody told them I had some ability to carry off a meeting, and they asked me to become a chairman for the first meeting.

Q. Was anything said about the A F of L?

A. I don't believe so.

Q. Did you have any further conversation with them before the first meeting?

A. Before the first meeting? Yes, I believe I did. Howard Sharrar, at lunch time. [149]

(Testimony of Robert L. Stevens.)

Q. What was that conversation?

A. In regard to the procedure of the first meeting.

Trial Examiner Myers: Did you ever belong to a labor organization?

The Witness: Yes, sir, AFL.

Trial Examiner Myers: That was at Goodyear?

The Witness: No, sir. I was in the foremen's club at Goodyear. They had a CIO in the shop and a foremen's club in the office force.

Trial Examiner Myers: Where did you belong to the A F of L?

The Witness: Right here locally. Let's see, Builders and Carpenters Union.

Trial Examiner Myers: When?

The Witness: Oh, about five or six years ago.

Trial Examiner Myers: They have a closed shop contract?

The Witness: No, sir.

Trial Examiner Myers: What is it?

The Witness: No, sir, they did not.

Q. (By Mr. Harrington) In this conversation with Howard Sharrar, that you have mentioned you had during the lunch period, was anything said about the A F of L?

A. I believe when he approached me I thought he was approaching me for A F of L and I think I told him I wasn't interested in joining any A F of L. [150]

Q. What did he say?

(Testimony of Robert L. Stevens.)

A. He told me it was not. It was the formation of an association among ourselves.

Q. Did he say why it was being formed?

A. No, sir.

Q. And I believe you stated then you acted as temporary chairman at the first meeting?

A. Yes.

Q. Were you chairman at the second meeting?

A. Yes, sir. I was appointed as chairman of that meeting, to continue until a president was elected.

Q. Who appointed you?

A. The appointment was made, I believe—it is in the books. I couldn't be sure right now. It is in the minutes of the meeting.

Q. At the first meeting were you appointed or elected? A. Temporarily appointed.

Q. Appointed?

A. Yes, that is right, by the assembly.

Q. Do you know George Williams?

A. Yes, sir.

Trial Examiner Myers: George Williams?

Mr. Harrington: George Williams, yes.

Q. (By Mr. Harrington) What is his position in the plant?

A. I believe he is foreman of the inspectors, Plant 1. [151]

Mr. Williams: Sheet inspector.

The Witness: Sheet inspector, Plant 1.

Q. (By Mr. Harrington) Have you had any conversations with him about the Association?

(Testimony of Robert L. Stevens.)

A. Officially, no.

Q. Have you had any conversation with him?

A. Oh, yes. When the two men were running, the time we went to lunch and we spoke about it just offhand.

Q. When was that?

A. Oh, I should judge about three weeks or two before the meeting.

Trial Examiner Myers: What do you mean "when the two men were running"?

The Witness: Two men from his department were running for secretary and treasurer.

Trial Examiner Myers: Who were they?

The Witness: Earnie Colburne and Jack Elliott.

Q. (By Mr. Harrington) Where did you have this conversation with Mr. Williams?

A. At a restaurant on Colorado and Central.

Q. Did you have any conversation with him in the plant about it?

A. Not referring to that, no. We might have spoke about it, but it had no bearing.

Q. Mr. Stevens, did you sign an affidavit in this case in [152] September?

A. Yes, sir, with reservation. And I believe when the attorney called me up on that I told him not to interpret that statement that I went to Mr. George Williams about the two men involved.

Q. Well, did you have a conversation with him in the plant?

A. I said I might have, yes.

(Testimony of Robert L. Stevens.)

Trial Examiner Myers: With Williams?

The Witness: Yes, sir, going for coffee or a smoke, or something like that, something might have been said.

Q. (By Mr. Harrington) Did you have a conversation with him at his desk?

A. Not that I know of.

Q. About these two men?

A. Not with reference to this.

Trial Examiner Myers: What conversation did you have at lunch?

The Witness: Discussing the two men running whether he was, oh, —I couldn't state exactly the words that were said.

Trial Examiner Myers: Of course not. I don't expect you to.

The Witness: No.

Trial Examiner Myers: Tell us what you remember of it.

The Witness: I told him that the two men from his [153] plant were running; if he had any objections.

Trial Examiner Myers: Running for what?

The Witness: Running for secretary and treasurer.

Trial Examiner Myers: Did you tell him that?

The Witness: Did I tell him what?

Trial Examiner Myers: Yes. Tell us what you remember telling him.

The Witness: That is what I remember telling

(Testimony of Robert L. Stevens.)

him. He says, "Why, no, it nothing to me". That is all it was. In other words, just like it was a pretty good battle between the two men.

Trial Examiner Myers: Why did you do that?

The Witness: No reason, just like I would talk to you about something, the weather or something else.

Trial Examiner Myers: Go ahead, Mr. Harrington.

Q. (By Mr. Harrington) Did you have this conversation at Mr. Williams' desk?

A. I don't think so. [154]

Q. (By Mr. Harrington) Now, where was the conversation with George Williams?

A. The conversation with George Williams was still on the way to coffee. And I believe I called up the attorney, when he talked to me about this, and I told him that I objected to that, and I believe I called up Mr. Ogren in regard to that.

Q. This statement, "I talked with him at his desk", is not [157] correct?

A. That is not correct. And I did not go to him to talk to him,

Trial Examiner Myers: Is there anything else in that statement that is not correct?

The Witness: No, sir, that is all.

Trial Examiner Myers: Would you say the statement took place in the lunchroom and did not take place at Mr. Williams' desk?

The Witness: The first one, yes, sir. And the other one on the way to coffee.

(Testimony of Robert L. Stevens.)

Q. (By Mr. Harrington) Was there anyone else present? A. No, sir.

Q. When those statements were made?

A. No, sir.

Q. Are you acquainted with Mr. Sigafoose?

A. Yes, sir.

Mr. Collins: What is that name?

Mr. Harrington: Sigafoose.

Q. (By Mr. Harrington) Was he a member of the Association? A. Yes.

Q. Was he an official in the Association?

A. Yes, sir.

Q. Is he still an official in the Association?

A. No, sir. [158]

Q. What official position did he hold in the Association? A. Director.

Q. What happened to him as a director? Did he resign or did his term expire?

A. He resigned; he found another job.

Trial Examiner Myers: He is not at the plant any more?

The Witness: No.

Trial Examiner Myers: He had the job as director until he quit working for the Kinner Motors?

The Witness: Yes. And he handed in his resignation.

Q. (By Mr. Harrington) Did you have any discussion with anybody at the plant as to someone to take Sigafoose's place?

(Testimony of Robert L. Stevens.)

A. I believe I did. I believe I talked to Cliff Malamphi.

Q. What is Mr. Malamphi's position?

A. I think he is a leadman.

Q. Who is he under?

A. Under Ross Nichols.

Trial Examiner Myers: What plant is that?

The Witness: Plant 1.

Trial Examiner Myers: What department?

The Witness: In the toolroom.

Q. (By Mr. Harrington) What does Malamphi do, if you know?

A. I don't know really.

Q. You don't know what his duties are?

A. No. [159]

Q. What was your conversation with him?

A. I just told him that if he had any recommendations, or anything, to go around to the men and see if there is a man who could take Mr. Sigafosse's place as director.

Trial Examiner Myers: Whom is this?

The Witness: This was upon Mr. Sigafosse's resignation.

Trial Examiner Myers: When?

The Witness: I couldn't tell you the date.

Trial Examiner Myers: Don't you know what month?

The Witness: June or July.

Trial Examiner Myers: June or July, this year?

The Witness: Yes.

(Testimony of Robert L. Stevens.)

Trial Examiner Myers: What was your position at that time?

The Witness: I was president.

Trial Examiner Myers: What was your position at that time?

The Witness: I was president.

Trial Examiner Myers: At the plant?

The Witness: At the plant?

Trial Examiner Myers: Yes.

The Witness: Receiving clerk.

Q. (By Mr. Harrington) Do you have any authority to transfer employees?

A. To transfer employees? [160]

Q. Yes. A. No.

Q. Or to recommend their transfer?

A. No.

Q. Do you make any recommendations with respect to employees under you? A. No, sir.

Q. I believe you were elected president of the Association? A. Yes, sir.

Q. Are you still president of the Association?

A. No, sir; terminated the 30th of last month.

Q. Was that when the term of office expired?

A. That is right.

Trial Examiner Myers: Are you still a member of the Association?

The Witness: Yes, sir.

Q. (By Mr. Harrington) As president of the Association did you have anything to do with the drawing up of the contract between the company and the Association?

(Testimony of Robert L. Stevens.)

A. None other than the other board of director member. When it was presented to us by the attorney we went over it with him.

Q. At the time the contract was entered into and signed between the company and the Association, did you make any arrangements as to having it printed or distributed, or any- [161] thing of that nature? A. Phrase that again. please.

Q. After the contract was entered into and was signed—— A. Yes.

Q. ——as president of the Association did you have any conversations or any talks with any members of the management with respect to how the contract was to be distributed to the employees?

A. You mean the agreement distributed?

Q. Yes.

A. Yes, when we received the first 200. It was in a meeting of September and we distributed those at the meeting. The people that did not receive it at the meeting, it was distributed by the personnel department through the timekeeper.

Q. Looking at Board's Exhibit 6, which is the agreement between the company and the Association, do you know how the application for membership in the Association happened to become a part of this contract?

A. Yes, through the recommendation of the board of directors in the meeting between the representatives of the company and the Association we decided to copy from other associations, the same forms.

(Testimony of Robert L. Stevens.)

Q. Is there anything in the contract——

A. I believe there in the contract. [162]

Q. Will you point out anything in the contract that has anything to do with the application for membership?

Mr. Proctor: I think the contract speaks for itself.

Trial Examiner Myers: I will sustain the objection.

Q. (By Mr. Harrington) Did I understand you to say that it was through discussion with the company?

A. With Mr. Sullivan.

Q. Who is Mr. Sullivan?

A. He is the personnel director.

Q. What was your discussion with Mr. Sullivan?

A. As to the type to use, the same as the other associations have; we had about five or six copies of different firms.

Q. And did Mr. Sullivan agree it would be put in a booklet, in Board Exhibit 6?

A. Yes.

Q. And be distributed to employees?

A. Yes.

Mr. Harrington: I ask to have marked as Board's Exhibit 7 a paper entitled "Notice to Night Shift Employees", signed by Robert L. Stevens as president.

(Thereupon, the document referred to was marked for identification as Board's Exhibit No. 7.)

Q. Sometime in June? A. Yes.

Q. Was it before or after the contract?

A. It was after the contract.

Trial Examiner Myers: You say they allowed you to post that. Who is "they"?

The Witness: The Kinner Motors Company.

Q. (By Mr. Harrington) That would be after June 16th? A. That is right.

Q. Can you place it any more definitely than that?

A. No, I am sure I couldn't. I am sorry.

Mr. Harrington: I offer Board's Exhibit 7, for identification, in evidence. [164]

(Thereupon, the documents heretofore marked for identification as Board's Exhibit Nos. 7 and 8 were received in evidence.)

(Testimony of Robert L. Stevens.)

Q. (By Mr. Harrington) Is that your signature (indicating)? A. Yes, sir. [163]

Q. On Board's Exhibit 7, for identification?

A. Yes, sir.

Q. Was this posted in the plant?

A. Yes, sir.

Q. Who posted it? A. I believe I did.

Q. And where in the plant did you post it?

A. Temporary bulletin boards they allowed us to use, two of them.

Q. When was it posted?

A. The date, you mean?

Q. Yes. A. Sometime in June.

(Testimony of Robert L. Stevens.)

BOARD'S EXHIBIT No. 7

NOTICE TO NIGHT SHIFT EMPLOYEES

Please be advised that commencing immediately a bonus for night shift employees of five cents an hour will be paid by Kinner Motor Company, Inc., in accordance with the terms of the contract recently executed by and between Kinner Motor Company, Inc., and Kinner Motors Employees Association, Inc.

Please be further advised that this bonus has been approved by the War Labor Board.

KINNER MOTORS EMPLOY-
EES ASSOCIATION. INC.

By ROBT. L. STEVENS
President

BOARD'S EXHIBIT No. 8

July 15, 1943

1. Correcting misstatements that are being made in the plant with reference to present wage raises, we wish to advise that no Union or other organization was responsible for these raises and further had no part at all in obtaining them. According to law no organization can obtain raises for employees without the company's consent.

2. According to law the company has to make all applications. The applications must be made to the War Labor Board and no increases can be

(Testimony of Robert L. Stevens.)

granted without the approval of the War Labor Board. As all of you are aware we made application for general increases on December 10, 1942. The delay in obtaining consent to raises has been occasioned by not receiving the approval of the War Labor Board. The company recently obtained partial approval from the War Labor Board, effective July 5, 1943.

3. Raises are being granted wherever allowed by the War Labor Board as fast as same can be processed, and we are using every effort to obtain as rapidly as possible the raises we have requested. This does not mean that everyone will receive a raise, inasmuch as several applications to the War Labor Board have been denied due to no fault of the company. In this connection the company is contesting same in the employees' behalf.

4. Once more, contrary to information which is being circulated in this plant, No Organization Had Anything To Do With Granting Of The Present Increases.

KINNER MOTORS, INC.

EARL HERRING,

President.

Q. (By Mr. Harrington) When did you have this conference or discussion with Mr. Sullivan, the personnel director, when you insisted the membership cards be in the contract?

(Testimony of Robert L. Stevens.)

A. Prior to the printing of this agreement.

[182]

Q. Was that before or after——

A. That was after the contract and agreement was signed.

Q. After June 16th? A. Yes.

Q. After the contract was entered into?

A. Yes.

Q. When was the contract printed and distributed? A. Sometime in September.

Q. And it was before those two dates you had this conference with Mr. Sullivan? A. Yes.

Q. Have any signed cards been returned, any signed membership cards? A. Yes, sir. [183]

CHRISTINE JAGOE,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Christine Jagoe.

Trial Examiner Myers: Spell your name for the record.

The Witness: C-h-r-i-s-t-i-n-e J-a-g-o-e.

Trial Examiner Myers: Is it Miss or Mrs.?

The Witness: Mrs. [194]

Trial Examiner Myers: Where do you live, Mrs. Jagoe?

(Testimony of Christine Jagoe.)

The Witness: 2309 Florencita in Montrose.

Trial Examiner Myers: You may be seated.

You may proceed, Mr. Harrington.

Q. (By Mr. Harrington) Are you employed by Kinner Motors?

A. Yes, I am.

Q. What position do you hold?

A. Stenographic secretary to Mr. Sullivan.

Q. Who is Mr. Sullivan?

A. Personnel director at Kinner.

Q. What work do you do?

A. Why, I do the preliminary interviewing and I answer the telephone and handle the Selective Service work.

Q. When you say "preliminary interviewing", interviewing of whom? A. Of applicants.

Q. Applicants for employment?

A. Yes, sir.

Q. Do you handle Mr. Sullivan's correspondence?

A. Some of it. There are three stenographers in the office.

Q. Do the other stenographers handle his correspondence, also?

A. Do the others handle his correspondence?

Q. Yes. A. Yes. [195]

Q. As much as you do?

A. I believe one girl does more of his correspondence than I.

Q. Do you have anything to do with replacement schedules?

(Testimony of Christine Jagoe.)

A. Yes, sir, I make up all the replacement schedules and Manning Tables.

Q. What are the Manning Tables?

A. That is a part of the Selective Service plan, War Manpower Commission.

Q. Do you have anything else to do with Selective Service?

A. I write the majority of the appeal letters, and I contact the local boards for the employees and arrange for their physical and their induction.

Q. Do you have anything to do with work in connection with the War Manpower Commission?

A. Only in having my schedules approved.

Q. After you interview applicants for employment, what do you do about the interview?

A. If Mr. Sullivan is in the office I take the application in to Mr. Sullivan and have the applicant come in and talk to Mr. Sullivan. If Mr. Sullivan shouldn't be in the office I contact the department head who will tell me whether they have use for the man or not.

Q. Do you make any recommendations with respect to whether or not applicants should be employed? [196]

A. Only if on the telephone they might say, "Do you think she looks all right in the way of a stenographer?"

And I will say, "Yes" or "No".

They don't go on my word completely. I don't do any hiring at all.

(Testimony of Christine Jagoe.)

Q. Do you do any confidential work for Mr. Sullivan?

A. I don't open his own confidential mail. He opens all his own confidential mail.

Trial Examiner Myers: Do you handle all mail that is not confidential?

The Witness: Yes.

Trial Examiner Myers: What is Mr. Sullivan's first name?

The Witness: Emmett.

Q. (By Mr. Harrington) What are his initials?

A. E. J.

Q. What is your salary?

A. 84 cents an hour.

Q. Do you get paid by the hour or month?

A. We have just transferred over all office employees to hourly rates; it amounts to \$145.00 a month.

Q. When did you transfer to hourly rates?

A. We are still in the process of changing records, but I think they started it some time in July. I couldn't say for sure. [197]

Q. And before that were you on a monthly salary?

A. Yes, sir.

Q. Are you acquainted with the Kinner Motors Employees Association?

A. Yes, sir.

Q. When did you first become acquainted with it?

A. I first became acquainted with the Association the day I signed my membership card.

Q. When was that?

(Testimony of Christine Jagoe.)

A. That was the Thursday before the Friday of the first meeting.

Trial Examiner Myers: What month was that?

The Witness: Well, the first meeting, I believe, was in March.

Mr. Harrington: I believe we have stipulated as to when the first meeting was, Mr. Examiner.

The Witness: I don't know.

Mr. Harrington: That was on April 16th; isn't that correct, Mr. Proctor?

The Witness: That is ocrrect. [198]

(Thereupon, the document heretofore marked for identification as Board's Exhibit 10, was received in evidence.)

BOARD'S EXHIBIT No. 10

I, the undersigned, hereby designate and appoint Kinner Motors Employees' Association, Inc., as my exclusive bargaining agent under and by virtue of the terms of the National Labor Relations Act.

Dated this 15 day of April, 1943.

CHRISTINE A. JAGOE.

Q. (By Mr. Harrington) I believe I asked you, Mrs. Jagoe, if you attended the first meeting on April 16th? A. Yes.

Trial Examiner Myers: On April what?

Mr. Harrington: April 16, 1943.

Q. (By Mr. Harrington) Did you participate in that meeting? A. I took the minutes down.

(Testimony of Christine Jagoe.)

Q. How did you come to take the minutes?

A. Rose Minor of the personnel office asked me to take them.

Trial Examiner Myers: Who?

The Witness: Rose Minor.

Trial Examiner Myers: How do you spell that name?

The Witness: R-o-s-e M-i-n-o-r.

Q. (By Mr. Harrington) Was she a member of the Association? A. Yes.

Trial Examiner Myers: What is her job in the personnel office?

The Witness: Stenographic.

Q. (By Mr. Harrington) Are you classified as assistant to [200] the personnel director?

A. No, sir, I am not.

Q. Did you attend the next meeting of the Association? A. No, I did not.

Q. What work does Rose Minor do?

A. She handles mostly the employee insurance and employee records.

Q. Do you have access to the personnel files of the employees? A. Yes.

Q. Does Rose Minor have access to those files?

A. Everyone in the personnel office has access to them.

Q. Do you know who took over the work of secretary of the Association at the second meeting?

A. Who took over the work?

Q. Yes. A. Rose.

(Testimony of Christine Jagoe.)

Q. Rose? A. Yes.

Q. Rose Minor? A. Yes. [201]

Q. Tell us the routine, will you please, when a man comes up and applies for a job? Tell us all about it, will you please?

A. After he has been accepted by the department head or by the personnel director we make out a hiring form.

Q. Tell us what you do.

A. We make out the hiring form, which gives the employee's name and rate of pay and his occupation. Then they are instructed to come back the morning——

Q. You say "we do this and we do that". I am trying to find out who does it and what you have to do with it.

A. I say "we" because there are three girls doing the same work.

Q. I want to know what you do.

A. All right. I make out the hiring form and I instruct them to come back the morning they are to start to work.

Q. What else?

A. On the morning they start to work? Is that what you are interested in?

Q. I don't know what happens. Suppose I came there for a job and you interviewed me?

A. Yes.

Q. Will you go on from there so I would know just what [210] happens at the plant?

A. All right. After you have made out your

(Testimony of Christine Jagoe.)

application and have been interviewed and have been accepted for employment, you come back to my desk.

Q. Who sends me back to your desk?

A. The personnel director. I make out a hiring form on you and I instruct you to come back the morning you start to work. On the morning you start to work you come into the office and I fingerprint you. I have you sign an identification card. I give you a bond slip, if you want to buy bonds.

Q. That is, war bonds?

A. That is the war bonds. I have you sign four reference letters, to send to former employers and to designate a personal reference. I have you fill out a transportation slip, should you be interested in getting transportation to the plant. I give you a timeclock number, a job card and time card. And I explain the employee group insurance to you, which is voluntary. I give you some pamphlets from the nurse's office on vitamins and health. I give you a pamphlet on the credit union and we also have, in the same employee folder, a copy of the Employee's Association manual.

Q. What?

A. Of the Employee's Association—little brown book.

Q. Is that what you mean (indicating)?

A. That is it. [211]

Q. This is Board's Exhibit 6. Do you give that to the applicant?

A. That is right.

Q. Then what happens? Go ahead.

(Testimony of Christine Jagoe.)

A. Following that the employee is taken into the plant, after he has been given his employee badge.

Q. By whom?

A. Not by myself, but by one of the other girls in the office. She takes him to the timekeeper's office, shows him how to punch their job card and time card; then to their superior on the job.

Q. You give this applicant a lot of papers and a lot of forms and some pamphlets; is that right?

A. That is right.

Q. Do you talk this over with these people?

A. Only the group insurance needs explanation.

Q. Is that all? A. That is all.

Q. And what about this Board's Exhibit 6? What do you say there?

A. We don't open the conversation in any way because that, too, is voluntary, on the employee's part. We don't ask them to join or not to join.

Q. Do you call his attention to the fact there is an application blank in here? [212]

A. I don't know. I don't even open the book.

Q. You just hand him the book; is that right.

A. That is right. [213]

EARNEST M. COLBURN,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Earnest M. Colburn.

Trial Examiner Myers: Spell your last name for the record.

The Witness: C-o-l-b-u-r-n.

Trial Examiner Myers: Where do you live, Mr. Colburn?

The Witness: 626 North Kenwood, Glendale.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Harrington.

Q. (By Mr. Harrington) Are you employed by Kinner Motors? A. I am.

Q. How long have you been so employed?

A. Since January 21, 1942.

Q. What is your position at the company?

A. Up to about six weeks ago I was shop clerk, and clerk of inspection, I should say.

Q. What were your duties as shop clerk?

A. Well, the material control would telephone me to put certain orders in the shop. I would make out the necessary papers, deliver them to the raw stores and they, in turn, would [220] take the raw material to the shop.

Q. Who is your immediate superior?

A. George Williams.

Q. Did you act as secretary to George Williams?

(Testimony of Earnest M. Colburn.)

A. I do.

Q. What is George Williams' position?

A. Chief inspector.

Q. As secretary for Mr. Williams, what do you do?

A. Well, I write all the letters in connection with inspection work, interoffice mostly, and I make out material inspection reports as the material passes from either the vendor, outside vendors, or the shop, through the inspection department to finished stores.

Q. Do you do any confidential work?

A. Some.

Q. For Mr. Williams? A. Some.

Q. Does Mr. Williams have authority to hire and fire?

A. He has authority to hire, but I don't know as he has any authority—he may have authority to fire. I really never discussed it with him.

Q. In your work at the plant, do you have any contact with the shop employees? A. I do.

Q. In what way? [221]

A. Up to six weeks ago it was necessary for me to often straighten out paper work tangle that we had in the shop. For instance, a man on a machine might be using the wrong job number, or something of that kind, and I would have to go out there and straighten him out.

Q. Was your contact with the employees in the plant a direct contact? A. A direct contact.

Q. Did you contact them through Mr. Williams?

(Testimony of Earnest M. Colburn.)

A. Well, Mr. Williams—I did that work. He did not have to give me any instructions. I knew as the stuff went through, and maybe they would telephone me from the office that somebody was not using the right job number. I never discussed it with him. I just went out and took care of it.

Q. Are you a member of the Kinner Motors Employees Association? A. I am.

Q. Do you hold any position in that Association?

A. I do not.

Q. Did you? A. I did.

Q. What was it, please?

A. Secretary and treasurer.

Q. When did you hold that position?

A. I started September 26th and finished November 30th. [222]

Trial Examiner Myers: This year?

The Witness: This year.

Q. (By Mr. Harrington) What were your duties as secretary-treasurer?

A. I took the minutes of all the meetings.

Trial Examiner Myers: November 30th?

The Witness: November 30th, of this year.

Trial Examiner Myers: Two weeks, ago, approximately?

The Witness: Yes.

Trial Examiner Myers: You say you took the minutes of all the meetings?

The Witness: Yes.

Trial Examiner Myers: How many meetings were there?

(Testimony of Earnest M. Colburn.)

The Witness: There was always one a month, and we had one directors' meeting.

Trial Examiner Myers: What was the last meeting you took the minutes of?

The Witness: November 30th.

Q. (By Mr. Harrington) Did you sign an authorization card in the Association?

A. You mean application card?

Q. Yes. A. Yes.

Q. Who presented it to you?

A. Jack Williams, as I recall, passed those around during [223] the smoking period one day. I believe it was in March or thereabouts. And he left them on our desks and collected them during the lunch period. There was nothing——

Q. Where did Mr. Williams contact you?

A. I was at my desk. He said nothing, as I recall. He merely came through and left them on the desks and tables, and it was up to our own discretion as to whether we signed them or not.

Trial Examiner Myers: How do you know it was left up to your discretion? Did he say anything?

The Witness: He didn't say anything, no. All you had to do was read the slip; that was all there was to it.

Trial Examiner Myers: He just left some cards on the tables?

The Witness: Yes; said he would collect them later.

Q. (By Mr. Harrington) Did anybody discuss

(Testimony of Earnest M. Colburn.)

with you the position of secretary-treasurer in the Association before you assumed it?

A. I had the opportunity possibly to do that work for some time, but I had not been especially interested in it. I have a great many outside interests but I accepted it in September, September 26th.

Q. (By Trial Examiner Myers) Are you still working for the company? A. I am. [224]

Q. You said something before about that up to six weeks ago you held a certain position. What do you mean by that?

A. They have since taken the shop work from me and they have put a new department in called production control, and they have taken over all that work.

Q. What do you do now?

A. I merely do the inspection work.

Q. What do you mean "inspection work"?

A. Well, all the clerical work in connection with the inspection department.

Q. Is that what you mean by clerk of inspection? A. Yes, clerk of inspection.

Q. That is what you call yourself?

A. Yes, that is what I am now.

Q. Did you have anything to do with the inspection prior to six weeks ago?

A. Yes, I was doing that work in conjunction with the shop clerical work six weeks ago.

Q. Now your work is all confined to inspection?

A. To inspection.

Q. Who does the shop work?

(Testimony of Earnest M. Colburn.)

A. Production control.

Q. Any particular person?

A. They have a head of production control. There are a couple of young ladies, and one of the men in the shop called [225] Elmer Beard. I just couldn't be specific about it.

Trial Examiner Myers: All right. Go ahead, Mr. Harrington.

Mr. Harrington: Surely.

Q. (By Mr. Harrington) Do you know Robert Stevens? A. I do.

Q. Is he president of the Association?

A. He was at that time.

Q. At that time. Did you have any conversation with Mr. Stevens about assuming the position of secretary-treasurer?

A. Very little. Mr. Stevens never asked me to assume that position. Several members in the shop had asked me, due to the fact I have done stenographic work, and can do that work. Of course, naturally, it is rather hard to get a lot of shop people who can do that work and do it properly.

Q. You say Mr. Stevens had very little to say to you. What did he have to say?

A. Mr. Stevens knew nothing about it until I had been approached. In fact, I told Mr. Stevens I had been approached to accept the position.

Q. What did Mr. Stevens say?

A. Mr. Stevens said it was perfectly all right as far as he was concerned, if I wanted to handle it.

(Testimony of Earnest M. Colburn.)

Q. When was that conversation with Mr. Stevens?

A. It was prior to September 26. I couldn't say exactly. [226]

Q. Was anyone else present? A. No.

Q. Where was this conversation held?

A. Well, it was during the lunch period one day. I don't know just when; in the shop.

Q. Did Mr. Stevens ever talk to George Williams about it, in your presence?

A. I believe he did, yes.

Q. When was that?

A. Well, as I recall, due to the nature of my work, it was very heavy at that time, Mr. Stevens knew that and he came into the office—the small office where we were—it was about during the lunch period and the three of us—during the rest period—got up and walked over to the canteen, and we discussed it on the way over there.

Trial Examiner Myers: Who were the three?

The Witness: Mr. Stevens, Mr. George Williams and myself.

Q. (By Mr. Harrington) What was the discussion?

A. He asked Mr. George Williams—he did not want to accept—he did not want to upset any—he knew I was very busy, would he care if I accepted a position of that kind, would he have any objections to it.

Q. What did Mr. Williams say?

A. He said, "Why, why, surely, no." [227]

(Testimony of Earnest M. Colburn.)

He said, "If Colburn wants to do it, that is up to him".

Q. Did Mr. Stevens say what he would do if Mr. Williams had any objections to it?

A. No.

Q. Was there anything further said in the conversation?

A. No, —well, I might say that Mr. Williams did turn to me, and he said, "It is all right, Colburn, but I *don't* *you* to do any work during the regular working hours of the shop. Any work you do should be done outside of working hours."

And he says, "I want that to be specific." He was very specific about it.

Q. Where did you work before you came to Kinner Motors Company?

A. Well, I was personnel manager at Gladding McBean.

Q. Are you familiar with the membership of the Association?

A. Well, I think so, yes.

Q. Is Kenneth Freese a member of the Association?

A. No, he is not.

Q. Is Raymond L. Wildman a member of the Association?

A. He was, but he is not now; he resigned.

Q. Over what period of time was he a member?

A. Well, I think he resigned possibly about two months ago.

Trial Examiner Myers: Are you still a member of the Association?

The Witness: I am. [228]

(Testimony of Earnest M. Colburn.)

Q. (By Mr. Harrington) What was his position in the plant?

A. I don't really know. I couldn't say. The way it came up, I asked him about his dues, and he said that he didn't care to continue in the Association any more. I said, "Fine, if that is the way you feel about it."

Q. Is Joseph S. Wilson a member?

A. I don't recall him.

Q. Is Homer Watters a member?

A. I believe he is.

Q. What is Watters' position?

A. As far as I know he just runs one of the automatics in the shop.

Q. What constitutes membership in the Association? A. Beg pardon?

Q. What constitutes membership in the Association?

Mr. Collins: I object to that as calling for a conclusion.

Trial Examiner Myers: I will sustain the objection.

Mr. Collins: It would be hearsay.

Mr. Harrington: No further questions.

Trial Examiner Myers: Mr. Collins? [229]

JAMES M. DAVIS,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: James M. Davis. D-a-v-i-s.

Trial Examiner Myers: Where do you live, Mr. Davis?

The Witness: 327 West Cerritos, Glendale.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Harrington.

Q. (By Mr. Harrington): Are you employed by Kinner Motors?

A. Yes.

Q. How long have you been employed there?

A. Since October, 1941.

Q. On what shift?

A. On the second shift; that is, from 5:30 to 3:30.

Q. Have you been on that shift all the time?

A. No.

Q. Have you been on that shift continuously over any period of time?

A. About a year or a little better.

Trial Examiner Myers: You say 5:30 to 3:30?

The Witness: Yes.

Trial Examiner Myers: That is, 5:30 in the evening to [236] 3:30 in the morning?

The Witness: At the present time; it has been 4:30 to 2:30 before.

(Testimony of James M. Davis.)

Q. (By Mr. Harrington): Mr. Davis, have you seen any Association membership cards circulated in the plant? A. Yes.

Q. By whom? A. By B. C. Johnson.

Trial Examiner Myers: B. C. Johnson?

The Witness: Yes, sir.

Q. (By Mr. Harrington): What is Mr. Johnson's position in the plant?

A. He is the night foreman in the machine shop.

Trial Examiner Myers: When were these cards circulated? You have not fixed the time.

Mr. Harrington: I was coming to that, Mr. Examiner.

Q. (By Mr. Harrington): When?

A. It was sometime in April of this year.

Q. Was it during working hours?

A. Yes.

Q. Did Mr. Johnson give a card to you?

A. Yes, sir.

Q. Did he say anything to you at that time?

A. He came in and said, "Boys, we really got something here." [237]

He says, "Here is an application for Kinmer Motors Employees Association."

Trial Examiner Myers: Who was present when he said that, Mr. Harrington?

Mr. Harrington: Beg pardon?

Trial Examiner Myers: Who was present when Mr. Johnson is supposed to have said that?

Q. (By Mr. Harrington): Who was present?

A. Mr. Louis Gilpin and Mr. John Clinton.

(Testimony of James M. Davis.)

Trial Examiner Myers: And yourself?

The Witness: Yes, sir.

Q. (By Mr. Harrington): Do you know Mr. Roy Walker?

A. Yes, sir.

Q. What does he do?

A. He is the assistant night foreman.

Q. Have you ever heard him talk about the Association?

A. Yes, sir.

Q. Where?

A. In the shop.

Q. When?

A. I believe it was some time in June. That is the nearest I can get it.

Q. Of what year?

A. This year.

Q. What time of day? [238]

A. Between 9:30 and 10:00 o'clock.

Trial Examiner Myers: At night?

The Witness: Yes, sir.

Q. (By Mr. Harrington): Was that during working hours?

A. Yes, sir.

Q. Who was present?

A. All of the night crew.

Trial Examiner Myers: What man are you referring to? I didn't get the name.

Mr. Harrington: Roy Walker.

Q. (By Mr. Harrington): I believe you have identified Mr. Walker.

Trial Examiner Myers: I am just asking for his name. I didn't hear the name. Go ahead.

Q. (By Mr. Harrington): What did Mr. Walker say at that time?

A. He asked the employees to consider an em-

(Testimony of James M. Davis.)

employees' organization.

Q. Well, can you give us, in words, what he said, as closely as you can recall it?

A. He says—he got up and said, “While you fellows are all together,” he said, “I would like to make you a little speech.”

He said, “We are going to have a union here,” and he says, “I suggest to all employees that we form one of our own, that the A. F. of L. is dominated by Lockheed in the lodge we are to accept.” And he advised that we all join the [239] Kinner Motors Employees Association.

Q. Did Mr. Walker say anything else?

A. I don't recall any specific part of his speech, outside of that.

Q. How many men were present at that speech?

A. Around twenty, I would say.

Q. Were they employees on the night shift?

A. Yes, sir.

Q. Was Mr. Johnson present?

A. Yes, sir.

Trial Examiner Myers: Is that B. C. Johnson?

The Witness: Yes, sir.

Trial Examiner Myers: Who did you say Mr. Walker was?

The Witness: He was the assistant night foreman.

Trial Examiner Myers: Assistant to Mr. B. C. Johnson?

The Witness: Yes, sir.

Trial Examiner Myers: You say this took place some time in June, 1943?

(Testimony of James M. Davis.)

The Witness: Yes, sir.

Q. (By Mr. Harrington): Was an Association election ever held in the plant?

A. Yes, sir.

Q. When was it?

Mr. Collins: I didn't hear that question.

Trial Examiner Myers: Will the reporter please read [240] the last question and answer?

(The record was read.)

Mr. Proctor: I will object to that question on the ground there is no proper foundation laid.

Trial Examiner Myers: Overruled.

Q. (By Mr. Harrington): When was it?

A. I don't recall the exact date. I think it was sometime in October—no, not October, either. It was further back than that. I don't remember the exact date.

Trial Examiner Myers: Do you know what month?

The Witness: It was some time after he made the speech.

Trial Examiner Myers: Who made the speech?

The Witness: This Roy Walker.

Q. (By Mr. Harrington): Do you know what season of the year it was?

A. It must have been August, sometime in August.

Q. Will you describe what happened at that election?

A. Mr. Oren Caderet came into the toolroom——

Q. What is Mr. Caderet's position in the plant?

A. At that time he was mill operator?

(Testimony of James M. Davis.)

Q. Does he still hold that position?

A. He is a foreman in the plant, too, at the present time.

Q. Proceed.

A. He came into the toolroom and told the boys in the toolroom and myself that he had been asked to hold an election [241] for shop steward.

Q. Did he say who had asked him?

A. He said, "They asked me." He didn't say who "they" was.

Q. Proceed.

A. He said, "You boys fill out a slip, and there is a box located at the time clock"—and he pointed with his finger—"and you will drop your votes in that box for the man you want."

Q. Was there a box at the time clock?

A. Yes.

Q. Then what happened?

A. I told him that I wasn't a member of the organization. And he says, "That doesn't make any difference; vote, anyhow."

Q. Was the vote taken then?

A. I didn't vote.

Q. Was a vote taken? A. Yes, sir.

Q. What happened then?

A. That was all until later in the night.

Q. What is it?

A. Later in the night the votes were counted.

Q. Who counted the votes?

A. Roy Walker and Oren Caderet.

Q. Where did they count them? [242]

A. By Mr. Caderet's machine.

(Testimony of James M. Davis.)

Q. Was any announcement made as to the result? A. Yes, sir.

Q. Who by?

A. By Mr. Caderet and Mr. Walker.

Q. What did they say?

A. Mr. Walker came first and told me that Mr. Caderet had won by a few votes over he, himself.

Trial Examiner Myers: Who is Roy Walker?

The Witness: He is the assistant night foreman.

Trial Examiner Myers: He was at that time?

The Witness: Yes, sir.

Q. (By Mr. Harrington): Are you acquainted with Mr. E. J. Sullivan, personnel director?

A. Yes.

Q. Did you ever hear him make a speech about the Association? A. Yes.

Q. When? A. About a month ago.

Q. Where was that?

A. A month or six weeks, I wouldn't know.

Q. Where was this speech made?

A. It was made in the shop in Plant 2.

Q. Who was present? [243]

A. All of the employees and Mr. Howard Sharrar, the superintendent, night superintendent.

Q. Were the employees called together?

A. Yes, sir.

Q. By whom?

A. By Mr. Howard Sharrar. They were first notified by bulletins from the interoffice communications, something of that nature.

Mr. Proctor: Howard Sharrar or Howard Shore?

(Testimony of James M. Davis.)

The Witness: Sharrar.

Mr. Proctor: The gentleman that was on the stand here the other day?

The Witness: Yes, sir.

Q. (By Mr. Harrington): Were they memos distributed to the employees?

A. Yes.

Q. By whom?

A. By the foremen of the different departments.

Q. And at what time was this meeting held, at what time of day?

A. I don't remember just exactly what time it was.

Q. Was it during working hours?

A. I think it was around 8:00 o'clock; I will say around 8:00 o'clock.

Trial Examiner Myers: At night? [244]

The Witness: Yes.

Q. (By Mr. Harrington): Would that be during working hours? A. Yes.

Q. What did Mr. Sullivan say?

A. He said that he was going to make a little speech, that there had been some rumors going around the plant and he wanted to have a little better understanding.

Q. What else did he say?

A. He said that—well, he mentioned the Employees Association. He said he didn't have any right to solicit their membership, but it was organized for the employees and he thought it was best for them to join. It would be a closer cooperation between the shop and the management, and that

(Testimony of James M. Davis.)

anyone having any grievances to take them to the union, that he didn't want them to come to him with it. And anyone starting rumors any more or about wages between the—between two employees or about the hours, arguments over the hours, would be considered an act of sabotage, and dealt with accordingly.

Q. Did he say anything further about the Association?

A. He said that the Association had been approved by the War Labor Board, and that that would be used as the bible.

Q. Did he say anything about the agreement between management and the Association?

A. Yes, sir. He said he had some new books of the contract, and he laid them on a bench there besides the microphone, and [245] said everyone that didn't have one to come up and get it.

Q. Was anything further said?

A. That is all I recall. [246]

Redirect Examination

Q. (By Mr. Harrington): Was Mr. Walker in the tool room at the time the election was held, that you have testified about?

A. He was later in the night, after the votes were counted he came in and announced that Mr. Cadaret had won by a few votes.

Q. Did Mr. Walker participate in the election?

A. He helped count the votes.

Q. Did he vote himself?

A. I don't know about that.

Q. What does B. C. Johnson do in the plant?

(Testimony of James M. Davis.)

A. He looks after the—all the machines and the tool crib, and the production.

Q. Does Mr. Johnson give you orders?

A. Well, to some extent. The tool room is separate from the production.

Q. Well, when you say “to some extent,” what do you mean?

A. Well, if you leave the plant before the working hours are over or something like that, you have to get a permit [266] from him to pass the gate.

Q. I see. Do you have to turn any work slips in to Mr. Johnson? A. No.

Q. Does he assign you your work?

A. No.

Q. What does Mr. Walker do in the plant?

A. He is the assistant to Johnson.

Q. What does he do?

A. When Mr. Johnson isn't there he takes over, takes his—charge of the shop.

Q. Does Mr. Walker assign you your work?

A. No.

Q. What would happen if you ran out of work?

Mr. Collins: I object to that.

Trial Examiner Myers: I will sustain the objection.

Q. (By Mr. Harrington): Have you ever run out of work?

A. No.

Q. When Mr. Glenn Gilmore told you if you didn't join the Association you would be sorry, did he say why you would be sorry?

(Testimony of James M. Davis.)

A. He said, "They told me to give you two chances." He didn't say who "they" were.

He said, "They told me to give you two chances to join."

Q. Did he say anything else? [267]

A. He said that I would be sorry if I didn't join. [268]

GEORGE ORRILL

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: George Orrill.

Trial Examiner Myers: Will you please spell your name for the record?

The Witness: O-r-r-i-l-l.

Trial Examiner Myers: Where do you live, Mr. Orrill?

The Witness: 12028 Martha Street, North Hollywood.

Trial Examiner Myers: You may be seated.

You may proceed, Mr. Harrington.

Q. (By Mr. Harrington): Are you employed by Kinner Motors?

A. Yes, sir.

Q. For how long have you been employed?

A. About four and a half years.

Q. What do you do in the plant?

(Testimony of George Orrill.)

A. Machinist.

Q. Do you have any employees under your supervision?

A. Well, more or less a leadman.

Q. When were you a leadman?

A. I have been for the last couple of years.

Q. How many employees have you under your supervision? [277]

A. Three or four.

Q. Who is your immediate superior?

A. Mr. Davey.

Trial Examiner Myers: Who?

The Witness: Mr. Davey.

Trial Examiner Myers: What is his first name?

The Witness: Ed Davey.

Trial Examiner Myers: D-a-v-e-y; is that right?

The Witness: Yes, sir.

Q. (By Mr. Harrington): Do you know Kenneth Freese?

A. Yes, I do.

Q. Is he an employee of the company?

A. Yes.

Q. What does he do? A. He is boss.

Q. What title does he have?

A. They never officially give him any title.

Q. How many men are under him?

A. About twenty.

Q. Have you ever taken his place in his absence?

A. Four months when he was sick.

Q. When was this?

A. Around the first of September.

(Testimony of George Orrill.)

Q. And how many men were under you at that time? A. Approximately the same. [278]

Mr. Collins: When was that? I didn't catch that date.

The Witness: September.

Mr. Collins: Of this year?

The Witness: For three months.

Q. (By Mr. Harrington): As leadman, what do you do?

A. I will set up jobs and check them and see they are running right.

Q. Do you have anything to do with transferring employees? A. No, sir.

Q. Have you ever recommended a transfer?

A. No, sir.

Q. Have you ever recommended any wage increases for employees under you? A. No.

Q. Do you give employees orders under you?

A. What I receive from the boss, that is all.

Q. Do you do any manual labor?

Mr. Proctor: I object.

Trial Examiner Myers: From what boss?

The Witness: Mr. Davey.

Mr. Proctor: If your Honor please, this line of questioning is all leading and suggestive right straight through. I haven't raised the point prior hereto——

Trial Examiner Myers: Don't lead the witness; I will sustain the objection. [179]

Q. (By Mr. Harrington): Are you a member of the Kinner Motors Employees Association?

(Testimony of George Orrill.)

A. I was.

Q. When did you join it?

A. When it first started.

Q. And when did you cease being a member?

A. Around October.

Trial Examiner Myers: This year?

The Witness: Yes, sir.

Trial Examiner Myers: Why did you stop?

The Witness: Well, I believed they weren't getting any place, and I just dropped out.

Q. (By Mr. Harrington): Was there any other reason why you stopped?

A. No, sir.

Q. Who was the first person who discussed the Association with you?

A. Mr. Jack Williams.

Q. Where was that? A. In the shop.

Q. When?

A. During the working day one day.

Q. Was anyone else present? A. No, sir.

Q. What did Mr. Williams say to you? [280]

A. He just said they were forming a company union and wanted to know if I wanted to join.

Q. What did you say?

A. I said I would like to join.

Q. Was there anything else said in that conversation? A. That is all.

Q. Did he give you any membership cards?

A. He gave me a few, to pass out to the ones around there at that end of the shop.

(Testimony of George Orrill.)

Q. Did you pass them out?

A. Yes, I passed a few of them out.

Trial Examiner Myers: To whom?

The Witness: Oh, to a couple of men in the shop.

Trial Examiner Myers: Men in your group?

The Witness: Yes, sir.

Q. (By Mr. Harrington) How many of them did you pass out? A. About three of them.

Q. When you passed them out to those employees, did you have any conversation with them?

A. I told them what it was, and if they wanted to join it was O.K. and if not it was O.K.

Q. What did you tell them it was?

A. Company union.

Trial Examiner Myers: Did they sign them?

The Witness: Yes. [281]

Trial Examiner Myers: Three of them?

The Witness: Yes.

Trial Examiner Myers: Did they give you the cards?

The Witness: They gave me the cards and I gave them back to Jack Williams.

Q. (By Mr. Harrington) Have you had any conversations with Kenneth Freese about the Association? A. No, sir.

Q. Did you sign an affidavit in this case, Mr. Orrill?

Trial Examiner Myers: Do you know what an affidavit is?

The Witness: I think I—I did over there in the personnel office.

(Testimony of George Orrill.)

Q. (By Mr. Harrington) Is this your signature (indicating)? A. Yes, sir.

Q. Is this you initial (indicating)?

Mr. Proctor: Counsel, I wonder if we might see that.

The Witness: Yes, sir.

Mr. Harrington: I was going to show it to counsel as soon as I had it identified.

Trial Examiner Myers: Show it to counsel.

Q. (By Mr. Harrington) I ask you, Mr. Orrill, to read this paragraph, to refresh your memory.

A. Yes.

Q. Having read that paragraph, Mr. Orrill, will you state [282] what your position in the plant is?

A. Well, I never did have an official title, if I was foreman or not. Mr. Davey asked me to take Kenny's place, that is all there was to it, until he got back.

Q. To take whose place?

A. Kenny Freese's place.

Q. Kenny Freese's place? A. Yes.

Q. (By Trial Examiner Myers) When you did take his place, what did you do?

A. I checked the different operations around, and moved the employees on different jobs as the work seemed fit.

Q. What is it?

A. Moved the employees to certain jobs that needed it, their production work.

Q. What else? A. That is about all I had.

(Testimony of George Orrill.)

Q. Were any men discharged while you were there in Freeze's place? A. No, sir.

Q. Were any new men brought in——

A. There was one or——

Q. —while Freeze was away?

A. There were one or two came in.

Q. What did you do with these men? [283]

A. I put them to work on different machines.

Q. Who sent the men to you?

A. Mr. Davey.

Q. He sent the men to you? A. Yes, sir.

Q. Did you tell Davey you needed more men?

A. No, sir.

Q. How did he happen to send two men to you? Did he tell you why?

A. He didn't tell me why.

Q. Then what happened? The two men came there and what happened?

A. I put them to work on the machines.

Q. Are they still on the same machines you put them on? A. They changed around.

Q. Did you change them? A. Yes.

Q. You changed the men from one job to another while you were in Mr. Freeze's place?

A. Yes, when the work ran out.

Q. Did anybody get a wage increase while you were working in Freeze's place?

A. Not that I know of.

Q. Did you recommend anybody for a wage increase? A. No, sir. [284]

Trial Examiner Myers: All right. Go ahead.

(Testimony of George Orrill.)

Q. (By Mr. Harrington) Will you read this sentence here (indicating)?

A. (Witness complies.)

Q. When you were working as leadman how many men were under you?

Mr. Proctor: I will object to that question as assuming facts not in evidence.

Trial Examiner Myers: I will sustain the objection.

Mr. Harrington: I believe the witness has already testified——

Trial Examiner Myers: Go ahead.

Mr. Harrington: —he had men under him.

Q. (By Mr. Harrington) How many men were under you?

A. At the time I took over, you mean?

Q. No. Before you took Mr. Freese's place.

A. There were about ten or twelve men. There are not as many working in the shop now.

Q. At that time there were ten or twelve men?

A. Yes.

Q. Did you give orders to those men?

A. Yes. [285]

Q. What did you do when you were a leadman?

A. I set up jobs and checked them at the same time.

Q. Is that the time you had ten or twelve men in the group? A. Yes.

Q. Is that right? A. Yes.

Q. And how much of your time was spent as a leadman and how much as an operator?

(Testimony of George Orrill.)

A. Most of my time is charged by operating machines, very little leadman.

Q. You went and took Freese's place for three months? A. Yes.

Q. During all that time you were still a member of the Association- A. No, sir. [287]

Q. When did you quit?

A. I dropped out before I took Freese's place.

Q. You dropped out before you took Freeze's place? A. Yes.

Q. How long were you a member of the Association? A. About three months.

Q. Did you sign a check-off card? A. No.

Q. They never checked off your dues?

A. They asked me if I wanted to pay up, but I said "No." I said I wanted to drop out and that is all there was to it.

Q. You never signed up? A. Yes.

Q. How long did you pay dues?

A. About three months.

Q. What is your job now?

A. I am a machinist, a machine operator.

Q. You are no longer a leadman?

A. I am back on my original job now.

Q. What is that? A. Running a machine.

Mr. Proctor: I will move all testimony after the time he severed his association with Kinner Motors Employees Association be stricken from the record. It has absolutely no bearing on any issue in this case, nothing he could have [288] done at that time

(Testimony of George Orrill.)

would serve as a prejudice to anyone's rights herein.

Trial Examiner Myers: The motion is denied.

Go ahead, Mr. Harrington. Are there any further questions?

Q. (By Mr. Harrington) Mr. Orrill, I ask you to read this sentence (indicating).

A. (Witness complies.)

Q. Now, when did you resign from the Association? A. Around August sometime.

Q. Was it before you substituted for Mr. Freese?

A. Yes.

Q. What did you mean in this statement when you state:

"I am a member of the Kinner Motors Employees Association, Inc. * * * At the present time I am substituting for Kenneth Freese, who is the regular foreman and who is on sick leave."

Were you a member at the time you made this affidavit, dated September 16, 1943?

A. That is right.

Trial Examiner Myers: Did you resign in writing?

The Witness: No.

Trial Examiner Myers: Whom did you tell you were no longer a member?

The Witness: To the secretary of the Association. [289]

Trial Examiner Myers: When did you tell him that?

The Witness: Around August.

(Testimony of George Orrill.)

Trial Examiner Myers: Who was the secretary?

The Witness: Mr. Colburn.

Trial Examiner Myers: He was the secretary in August, 1943?

The Witness: Yes.

Trial Examiner Myers: Well, just to refresh your recollection, Mr. Colburn was on the stand this morning and he testified that he didn't become secretary and treasurer of the Association until September 26, 1943.

Now, with that date in mind, can you tell us when you resigned from the Association?

The Witness: He asked me whether I wanted to pay up—it may not have been him, another man. I can't think who it was that was taking the money then. Lynn Brown I think it was; he was the treasurer.

Trial Examiner Myers: You didn't tell Colburn in August, did you?

The Witness: Colburn asked me during—while Kenny Freese was gone, if I wanted to pay up, and I said, "No."

Trial Examiner Myers: That is the time you told him you didn't want anything to do with the Association?

The Witness: Yes, sir.

Trial Examiner Myers: All right. That is the first [290] time you told anybody connected with the Association that you didn't want anything to do with the Association?

The Witness: Well, I told Lynn Brown when he

(Testimony of George Orrill.)

asked me, after I dropped out, if I wanted to pay up, and I said, "No."

Trial Examiner Myers: When did you have your conversation with Brown?

The Witness: That was in August.

Trial Examiner Myers: When did you drop out?

The Witness: Around in August sometime.

Trial Examiner Myers: What do you mean by "dropping out"?

The Witness: I just didn't pay any dues any more, and asked to get out.

Trial Examiner Myers: Whom did you ask?

The Witness: Lynn Brown.

Trial Examiner Myers: What did you say to him?

The Witness: He asked me if I wanted to pay the dues, and I told him I did not want to pay the dues any more, that I didn't want to belong anymore.

Trial Examiner Myers: Then what happened?

The Witness: He said, "O.K." and walked out.

Trial Examiner Myers: What did you say to Colburn?

The Witness: I said the same thing. He wanted to collect the dues, and I told him the same thing.

Trial Examiner Myers: That is the only way you got out [291] of the Association?

The Witness: Yes, sir.

Q. (By Mr. Harrington) What do you mean on September 26th, Mr. Orrill, when you stated, "I am

(Testimony of George Orrill.)

a member of the Kinner Motors Employees Association”?

A. Well, I was still a member. I wasn't paying dues, and I asked to get out.

Q. Have you discussed the Association with Kenneth Freese? A. No, sir.

Q. Will you read this paragraph (indicating)?

A. (Witness complies.)

Q. Does that refresh your recollection? Does that refresh your recollection as to whether or not you discussed the Association with Mr. Freese?

A. Yes.

Q. And did you?

A. I did not talk about the union.

Q. What did you say to him?

A. Well, Mr. Freese and I have been more or less friends for several years, and that is how we talked. We didn't talk about the Association at all.

Q. What do you mean by this statement: “I don't believe Freese passed out any cards for the Association; I have talked with Freese about it, and I believe he is for it, but he has not said so to me in so many words.” [292]

Will you explain what you meant by that statement?

A. Being around Mr. Freese I thought he was for it, in my own idea. He never come out and made any statements for it.

Q. What did you mean when you said, “I have

(Testimony of George Orrill.)

talked to him about it"? What did you say when you talked to him about it?

A. I told him I was signed up, and that is the only thing I said, we talked about.

Q. What did he say?

A. He didn't say it was good or bad. He didn't say anything about it.

Q. What led you to believe he was for it?

A. Just his words and actions when I was around.

Q. What were those words?

A. Well, I don't recall exactly.

Q. As closely as you can?

A. He thought it would be better to have a company union.

Q. Did he say that? A. Yes.

Q. When? Can you place the date of the conversation?

A. Over at his house one time. I don't remember when.

Q. Was anyone else present? A. No.

Trial Examiner Myers: Do you know what month?

The Witness: Around the first—around May sometime. [293]

Trial Examiner Myers: This year?

The Witness: Yes.

Q. (By Mr. Harrington) Did you have any other discussions with him about the Association?

A. That is all.

Q. Just that one discussion? A. Yes.

ALBERT GARDINER

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Albert Gardiner.

Trial Examiner Myers: Will you please spell your name for the record?

The Witness: A-l-b-e-r-t G-a-r-d-i-n-e-r.

Trial Examiner Myers: Where do you live, Mr. Gardiner?

The Witness: 1382 East Windsor Road, Glendale.

Trial Trial Examiner Myers: You may be seated. You may proceed, Mr. Harrington.

Q. (By Mr. Harrington) Are you employed by Kinner Motors? A. Yes.

Q. How long have you been employed by Kinner Motors? [304]

A. Since I was employed—I was employed from 1928 to 1937. I came back in 1938, to the present time.

Q. In March of 1943 what work did you do?

A. Running a crank pin machine.

Q. Were you doing any other work, any other type of work?

A. Well, any kind of lathe work.

Q. Did you have any employees under you at that time?

(Testimony of Albert Gardiner.)

A. Well, I don't know as you call them under me. I kind of supervised the crank shaft line.

Q. How many employees worked on that line?

A. Anywhere—sometimes six, sometimes eight, ten.

Q. When you say you supervised the crank shaft line, what do you mean?

A. I only just see the line is kept going.

Trial Examiner Myers: Tell us what you do during the entire shift of any day, a normal day.

The Witness: Well, some days I don't have to look after the men at all, they are pretty well organized themselves. But if one of them happens to run out of a job, I tell them what the next operation is and the likes of that.

Q. (By Mr. Harrington) Do you assign work to the men? A. Yes, sir.

Q. Do you keep the records of the time worked by the men? A. No, sir.

Q. Do you keep records of any kind? [305]

A. No.

Q. How long have you supervised the crank shaft line? A. More or less since '38.

Q. Is that up to the present time?

A. Yes.

Q. Do you make any recommendations as to wage increases? A. No, sir.

Q. Do you make any recommendations as to the work of the men under you?

A. No, not—no one else but myself; that is all.

(Testimony of Albert Gardiner.)

I recommend the jobs to the men, and tell them how I would like to have it done, and the likes of that. But so far as anyone else is concerned, no.

Q. What I meant was, do you make any recommendations to anyone above you as to the men under you? A. No, sir.

Q. Who is your immediate superior?

A. Mr. Davey.

Q. Mr. Ed Davey? A. Yes, sir.

Q. Are you a member of the Kinner Motors Employees Association? A. Yes, sir.

Q. When did you become a member of it?

A. Well, when it was organized. [306]

Q. (By Trial Examiner Myers) Who asked you to join? A. Jack Williams.

Q. Where did he ask you? A. In the shop.

Q. What time of day?

A. What time, did you say?

Q. Yes.

A. I don't know, sometime during the day.

Q. During working hours? A. Yes, sir.

Q. What did he say when he asked you?

A. Well, just asked if I didn't think having an Association of our own—he heard rumors the A.F. of L. wanted to get in there, and he thought us old-timers had been there so long and hadn't had any trouble or anything else, the company seemed to use us all right, why not have one of our own.

Q. Then what happened?

A. He said they were forming an Association. And he said, "Do you want to belong?" And I said, "Yes."

(Testimony of Albert Gardiner.)

Q. What happened then?

A. I signed an application to become a member.

Q. Did he give you any other cards?

A. Yes.

Q. What did he tell you when he gave you the cards?

A. He said, "See if you can get rid of these."

[307]

Q. Did you get rid of them?

A. I got rid of about ten.

Q. How did you get rid of them?

A. Some of them heard I had them and they come over and asked me about them when I was working, and I handed them to them. They would take them away and sign them and bring them back and hand them back to me.

Q. When you say, "I got rid of them" you mean you got employees to sign up? A. Yes.

Q. With the Association? A. Yes.

Q. To sign these application cards?

A. Yes.

Q. (By Mr. Harrington) At the time Jack Williams asked you to join the Association, did he ask you to take any official position in it?

A. What official position——

Mr. Proctor: I object to that on the ground counsel is leading these witnesses.

Trial Examiner Myers: I will sustain the objection.

Don't lead the witness.

Q. (By Mr. Harrington) Did Jack Williams

(Testimony of Albert Gardiner.)

say anything else to you at the time when he asked you to join the Association? A. No.

Q. Have you exhausted your recollection as to what he said [308] at that time?

A. Yes, I think that is all he said.

Mr. Harrington: Having exhausted the witness' recollection, I think the question is proper.

Trial Examiner Myers: Why don't you propound it then?

Q. (By Mr. Harrington) Did he ask you to serve as one of the incorporators?

Q. (By Mr. Harrington) What did you say?

A. I told him I would be willing. That is the last I heard of it. [309]

OREN HENRY CADARET

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Oren Henry Cadaret.

Trial Examiner Myers: Will you spell your entire name for the record?

The Witness: O-r-e-n H-e-n-r-y C-a-d-a-r-e-t.

Trial Examiner Myers: Where do you live, Mr. Cadaret?

The Witness: 1202 South Glendale Avenue, Glendale.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Harrington.

(Testimony of Oren Henry Cadaret.)

Q. (By Mr. Harrington) Are you employed by Kinner Motors, [313] Mr. Cadaret? A. Yes.

Q. What type of work do you do?

A. I am a leadman in the milling machines, plant 2.

Q. How many employees are under your supervision? A. Oh, about 18.

Q. How long have you been a leadman?

A. Since the first of October.

Q. What are your duties?

A. Oh, see that the machines are kept running, set a job—jobs have to be set up.

Q. Do you give orders to the men under you?

A. Well, yes, subject to my superior.

Q. Do you make any recommendations to your superior with respect to the men under you?

A. Well, I haven't. I don't know how to answer that. I haven't so far.

Q. Who is your superior?

A. Howard Sharrar.

Q. What is his position?

A. Superintendent.

Q. How long has he been superintendent?

A. How long has he been in?

Q. Yes.

A. I couldn't give you the dates, you know, on that. I [314] guess around the same time I have been there.

Q. That would be in October?

A. A little after that.

Q. Do you make out any time cards for the men

(Testimony of Oren Henry Cadaret.)

under you? A. No.

Q. Do you make out any forms of any kind?

A. No.

Q. Do you make any recommendations as to wage increases? A. I haven't.

Q. (By Trial Examiner Myers) How long have you been in this job you are talking about?

A. Since the first of October.

Q. This year? A. Yes.

Q. (By Mr. Harrington) Are you a member of the Kinner Motors Employees Association?

A. Yes, sir.

Q. When did you join it?

A. Well, I can't give you dates. It was—when it first started.

Q. Did you ever solicit anybody to join the Association?

A. I passed slips around at night for them to either sign, if they wanted to, or if they didn't want to.

Q. Was that during working hours?

A. It was. [315]

Q. Who gave you the slips?

A. Jim Brown.

Q. What does Jim Brown do?

A. Jim is a leadman on days now; at that time he wasn't.

Q. What did he do at that time?

A. He was operating machines on a day shift.

Q. What shift are you on, Mr. Cadaret?

A. I am on the night shift.

(Testimony of Oren Henry Cadaret.)

Q. Have you been on the night shift all the time? A. Night shift all the time, yes.

Q. Did you participate in any election held by the Association in the plant or by members of the Association?

Mr. Proctor: I object to that on the ground there is no proper foundation laid.

Trial Examiner Myers: What do you mean “no proper foundation”?

Mr. Proctor: He ought to ask—you have to have some dates and where and when, and so forth.

Mr. Harrington: I was coming to that.

Trial Examiner Myers: He will bring that out, I imagine.

Mr. Harrington: Yes, I was coming to that.

Trial Examiner Myers: I will overrule the objection. If he doesn't fix the time I will entertain a motion to strike. [316]

The Witness: Let's have that again, please.

Trial Examiner Myers: Will the Reporter please read the question to the witness.

(Question read.)

The Witness: It wasn't by the Association. It was to elect a shop steward, to represent the night men.

Q. (By Mr. Harrington): When was this election held?

A. I can't give you any dates, because I am no good at it.

Q. Can you place the month or the time of year?

A. We could say it was in the same year the thing started, last year.

(Testimony of Oren Henry Cadaret.)

Trial Examiner Myers: It started this year; didn't it?

The Witness: Or this year. As far as dates and everything, it was right after we started the organization; right after I joined.

Q. (By Mr. Harrington): What part did you take in the election?

A. I just passed the slips around. I didn't want to run for it, but it was up to the men themselves to elect whoever they wanted. I think there were three names on it, I believe. They could vote for anyone they wanted to.

Q. Well, how did the question of electing a steward come up?

A. Just amongst ourselves.

Q. Among whom? [317]

A. Amongst the men, night men. They wanted somebody, you know, to go to the meetings and report back what was going on. Otherwise, they wouldn't have known what was going on.

Q. And what was to be the function of this steward?

A. That was all; I just answered it. Just to report back what was going on at the meetings.

Q. The steward would attend the meetings; is that correct?

A. Yes.

Q. Did you participate in the election?

A. Did I vote?

Mr. Harrington: Strike that, please.

Q. (By Mr. Harrington): Did you talk to the fellows on the night shift about the election, before it was held?

(Testimony of Oren Henry Cadaret.)

A. Oh, no, no; there was nothing to do.

Q. There was what?

A. There was nothing like that, just pass the slips around and they put down who they wanted to represent them.

Q. Before the slips were passed around, what was done? A. Nothing.

Q. Were the men told what they were to vote for? A. No.

Trial Examiner Myers: What is it?

The Witness: Did I understand you to say, "who to vote for"?

Q. (By Mr. Harrington): No. Were they told what the [318] election was about?

A. At the time the slips were handed to them.

Q. Who told them that? A. I did.

Q. What did you tell them?

A. To vote for a representative, whoever they wanted.

Q. Then was a vote taken? A. Yes.

Q. How was the vote taken?

A. There was a little box put there and they were to drop it in the box, and that was all there was to it.

Q. Who put the box there?

A. I believe I did.

Trial Examiner Myers: Where was the box put?

The Witness: Why, near the timeclock on the little table.

Q. (By Mr. Harrington): Who counted the votes?

(Testimony of Oren Henry Cadaret.)

A. Well, if I remember right, there were two or three. I think Wallace was one, and a fellow by the name of Les, and I was right there myself.

Q. When was the vote taken? Was it during working hours?

A. Yes. Well, they were thrown in. It was counted, I believe it was either during the smoking period or during lunch when they were counted.

Q. Have you attended meetings? [319]

A. A couple.

Q. Since then? A. A couple of them.

Q. A couple of them? A. Yes.

Q. Were those meetings held during your working hours? A. All during working hours, yes.

Q. Did you lay off of work to go to the meetings?

Mr. Proctor: I object to that on the ground it is leading the witness again.

Trial Examiner Myers: I will sustain the objection.

Q. (By Mr. Harrington): When did you attend those meetings?

A. Whenever they were held, and whatever day they were held on; at night.

Q. And that was during your working hours; wasn't it? A. Yes.

Mr. Proctor: I object to that on the ground it is leading the witness again.

Trial Examiner Myers: I will sustain the objection.

(Testimony of Orin Henry Cadaret.)

Q. (By Mr. Harrington): At what time were the meetings held?

A. Supposed to be called at eight o'clock.

Q. At night? A. At night.

Q. And what are your working hours? [320]

Trial Examiner Myers: Not when they were supposed to be called. When did you attend the meeting?

The Witness: At night.

Trial Examiner Myers: About what hour?

The Witness: Eight o'clock.

Q. (By Mr. Harrington): What are your working hours?

A. They were at that time from 4:30 to 2:30.

Trial Examiner Myers: 4:30 in the afternoon to 2:30 in the morning?

The Witness: Yes, sir.

Q. (By Mr. Harrington): When you attended those meetings, did you lay off work?

A. I went over there and come back to work.

Q. Did your pay run while you were attending the meetings?

A. I didn't punch my clock out.

Q. Were you excused by anybody to attend the meetings? A. No. [321]

Q. How long did the meetings last? How long did each meeting last? A. An hour.

Q. An hour? A. Yes.

Q. After the meeting was over, did you come back to work? A. Yes.

Q. Where were the meetings held?

A. At the American Legion Hall. I can't tell

(Testimony of Oren Henry Cadaret.)

you the street.

Trial Examiner Myers: In Glendale?

The Witness: In Glendale, yes.

Q. (By Mr. Harrington): How far is that from the plant?

A. About a 7 or 8 minute ride.

Q. Since the Association has been formed, have you passed out any application cards to employees?

A. Application cards?

Q. Yes. A. Yes.

Q. When?

A. Well, I passed them out here about a week ago, some.

Q. Where did you pass them out?

A. In the shop.

Q. At what time?

A. I couldn't say. It was at night. [322]

Q. Was it during working hours?

A. Yes, during smoke period.

Q. How many did you pass out?

A. Oh, 15, 16, something like that.

Trial Examiner Myers: To whom did you pass them out?

The Witness: To the employees.

Q. (By Mr. Harrington) Can you name any of the employees? A. Not offhand, no.

Q. What position are you now holding in the plant? A. What is it?

Q. What is your position in the plant at the present time?

A. Leadman, milling machines at nights. [323]

ROY CONNOR WALKER

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness. Roy Connor Walker.

Trial Examiner Myers: Will you please spell your last name for the record?

The Witness: W-a-l-k-e-r.

Trial Examiner Myers: Where do you live?

The Witness: In Van Nuys, at 6931 Long Ridge Avenue.

Trial Examiner Myers: You may be seated.

You may proceed, Mr. Harrington.

Q. (By Mr. Harrington) Are you employed by Kinner Motors? A. Yes, sir.

Q. How long have you been employed by Kinner Motors?

A. Well, the last time I commenced to work for them I believe was in 1939.

Q. What do you do in the plant?

A. Machine operator. [326]

Q. Who is your immediate superior?

A. Mr. Johnson.

Q. What is his first name? A. Brian.

Q. Does he have an initial?

A. B. C., Brian C. Johnson.

Q. What is his position?

A. He is the night foreman.

Q. When Johnson is off work, who takes his place? A. I do.

(Testimony of Roy Connor Walker.)

Q. How many days a week does the plant work?

A. Now?

Q. Yes. A. It works six days a week.

Q. Has it always worked six days a week?

A. No, sir.

Q. What other number of days a week have they worked?

A. They have worked five and they have worked seven.

Q. When did it work seven?

A. It has been quite some time ago. As near as I can place it is seems to be around the first of this year or last year that they changed. I can't set any exact date as to when it did change.

Trial Examiner Myers: They changed from seven to what?

The Witness: To six. [327]

Q. (By Mr. Harrington) How long was it on seven days?

A. Well, I don't know just exactly how long it was on seven days. It was on seven days for quite awhile. As to the exact amount of time, I don't recall that.

Trial Examiner Myers: Was it on for a year or so?

The Witness: I don't believe it was on for a year.

Q. (By Mr. Harrington) When the plant worked seven days a week, did Mr. Johnson work seven days?

(Testimony of Roy Connor Walker.)

A. Yes, he worked seven days at first, and then they changed things a little.

Q. When was the change?

A. Well, it seems to me like the change was back towards the first—well, maybe not back to the first of the year, but some time ago. They made the change, persons couldn't work seven days straight in a row.

Trial Examiner Myers: Let's get some time here before you go any farther.

Q. (By Mr. Harrington) Can you place the time when that occurred by the month?

A. I couldn't place it exactly, no, sir. It seems like, though, it was back close to the first of the year.

Q. Of this year? A. Yes, sir.

Q. (By Trial Examiner Myers) Now, what did they do around the first of the year? [328]

A. You mean when they made the change?

Q. I don't know what they did. I am trying to find that out from you.

A. They stopped the working of seven days straight by anyone, and we had to take one day off a week.

Q. How long did that last?

A. That just lasted until just recently.

Q. Would you say within a month or so?

A. Within, I should say, two months, three months, something like that.

Q. Since the first of the year up to about two months ago no one could work seven days straight in any one week; is that right?

(Testimony of Roy Connor Walker.)

A. Yes, something like that.

Trial Examiner Myers: All right.

Q. (By Mr. Harrington) During this period of time, that is, from the first of the year up to two months ago, did the plant operate seven days a week? A. Yes, sir.

Mr. Proctor: If your Honor please, I don't know what the materiality of all of this has to do with this case; for that reason I object to any further questioning along this line.

Trial Examiner Myers: I will overrule the objection. If he don't connect it up, I will entertain a motion to strike. [329]

Q. (By Mr. Harrington) During this period of time, from the first of the year to two months ago, who took Johnson's place on his day off?

A. I did.

Q. Johnson took one day a week off; is that right? A. Yes, sir.

Trial Examiner Myers: You say you took Johnson's place. What do you mean you took his place, as foreman?

The Witness: I looked after the jobs, saw that everybody had something to do. And if they had any trouble to help them out or if they run out of work, found another job for them.

Q. (By Mr. Harrington) Do you make any recommendations about the men under you to Mr. Johnson? A. No, sir.

Q. How many men are there in that department?

A. Now?

(Testimony of Roy Connor Walker.)

Q. Well, over the space of a year has it changed?

A. Well, it has been—I would say, for the size of the crew, it got up to almost 25, I think, at one time. And it has dropped back now to where there are less than 10, I believe.

Q. When was it 25?

A. It was 25 about a year ago.

Q. (By Trial Examiner Myers) What has it been since the [330] first of the year up to two months ago?

A. It has just gradually went down.

Q. From where to where?

A. Went down from around 25 down to less than 10.

Q. It has been about 10 or less than 10 for the last two months? A. Yes.

Q. (By Mr. Harrington) Are you a member of the Kinner Motors Employees Association?

A. Not at present.

Q. Were you a member? A. Yes, sir.

Q. When did you join it?

A. On the second meeting that was held. I think that was April or May.

Q. And how long did you remain a member?

A. I remained a member up until the month of November, I believe.

Q. Did you ever make a talk to the employees in the plant about the Association?

A. Not about the Association. I made a talk to them.

(Testimony of Roy Connor Walker.)

Q. When was this talk?

A. At lunch time.

Q. When?

A. That was about—I would say two or three weeks before [331] we ever heard of the Association.

Q. What did you say in this talk?

A. I told them at that time the A.F. of L. was handbiling us at the gate. And I told the boys, that night at lunch, that we were going to have some kind of an organization pretty soon, and I thought that it would be a good idea if we had one of our own from a financial standpoint. But I told them also that I could go along with them in anything they wanted to do.

Q. Did you say anything further?

A. No, sir, except that the fact there was considerable controversy about independent organizations and other organizations.

Q. Was Mr. B. C. Johnson present when you made that talk?

A. Yes, sir. [332]

EARL H. FRIAR

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Earl H. Friar.

(Testimony of Earl H. Friar.)

Trial Examiner Myers: Will you spell your name for the record?

The Witness: F-r-i-a-r.

Trial Examiner Myers: Where do you live?

The Witness: 2012 Robles Drive, Glendale.

Trial Examiner Myers: You may be seated.

You may proceed, Mr. Harrington.

Q. (By Mr. Harrington) Are you employed by Kinner Motors Company? A. Yes, sir.

Q. In what capacity are you employed?

A. I as a so-called leadman in the inspection department.

Q. On what shift? A. Day shift.

Q. Who is your immediate supervisor?

A. George Williams. [338]

Q. What is his position?

A. Chief inspector.

Q. What are you clasified as?

A. I really have no classification. There is no classification. As I say, I am a so-called leadman. And that just means I help the men under me. I charge my time to the same job as they do and not to the job assigned to foreman.

Q. What does your work consist of?

A. Helping, assigning jobs, and helping inspectors in the department.

Q. Do you have any employees under you?

A. Beg pardon?

Q. Do you have any employees under you?

A. Well, there are about eight employees in the department. I wouldn't say they were under me.

(Testimony of Earl H. Friar.)

Q. Do you make recommendations for wage increases? A. No.

Q. Have you ever done so? A. No.

Q. (By Trial Examiner Myers) How long have you had this job you call so-called leadman?

A. It was about coincidental with the time Mr. Williams was appointed chief inspector.

Q. When was that? [339]

A. That was about the first of last year or the end of 1942; it was about that time.

Q. Early 1942? A. Yes.

Q. Have you had the job almost two years?

A. Yes.

Q. Will you tell us what you do, from the time you get to the plant in the morning until you leave, if you are on the day shift? If you are not on the day shift, from the time you reach the plant until you leave?

A. The first thing in the morning I see all the inspectors have work to do, and when they have their jobs and are started on them, I find work for myself. Whenever an inspector in the department needs help he calls on me, and I help him. When the chief inspector leaves the department I take over the responsibilities in his place. And that is about all that consists of my day's work.

Q. Has any employee in that department ever asked you for a wage increase?

A. No, never.

Q. Or ever talked to about getting a wage increase? A. No.

(Testimony of Earl H. Friar.)

Q. Has the chief inspector ever talked to you about any men in the department, as to their work, the quality of their work? [340]

A. Just that we have discussed it. He never asked me to recommend it. It is just as you talk about a friend or an enemy, whichever the case might be.

Q. Who is the boss of that department?

A. Mr. Williams.

Q. George Williams?

A. George Williams.

Q. Now, you say he has had that job for the same length of time as you? A. Yes.

Q. What were you doing before you became a so-called leadman?

A. I was an inspector on the bench.

Q. Who told you you were not to be an inspector on the bench anymore?

A. I am still an inspector on the bench.

Q. Who told you to take this job?

A. Mr. Williams.

Q. What did he tell you?

A. Well, as you know, they need an inspector in the department to look after the other inspectors and take some of the responsibilities off the chief inspector. And that is my job. And he gave it to me.

Q. What did he tell you when he told you——

A. He didn't say I was to be foreman. He said, "You just [341] assume responsibility."

Q. I am not interested in what he did not tell

(Testimony of Earl H. Friar.)

you. A. You mean more explicitly?

Q. What did he tell you to do?

A. Mr. Williams had the same job I had before he became chief inspector. He simply said. "You are to take my place."

Q. And you knew what that meant; is that right?

A. This was never in writing. It just meant I was to take his responsibilities, whatever they were.

Q. How long had you been working there before Williams became chief inspector?

A. Since July 1, 1941.

Q. That is about seven months, I imagine,—

A. Yes, sir.

Q. —or something like that before you got this job, as you call it, of so-called leadman?

A. Yes.

Q. You watched Williams during that length of time; is that right? A. Yes.

Q. You knew what his duties were?

A. Yes.

Q. When he became chief inspector he came around and told you to take his job; is that right?

A. Yes. [342]

Q. And you have just been describing what you have been doing for the last 22 months, also?

A. Yes.

Trial Examiner Myers: All right. Go ahead, Mr. Harrington.

Q. (By Mr. Harrington) Did you make an affidavit in this case, Mr. Friar?

A. Yes, I believe I did.

(Testimony of Earl H. Friar.)

Trial Examiner Myers: Now, wait, before you go ahead.

Q. (By Trial Examiner Myers) Now you are an inspector and inspect certain parts?

A. Yes, sir.

Q. And occasionally an inspector will want to reject a piece; is that right? A. Yes, sir.

Q. What happens when an inspector says, "This piece is not up to specifications," or whatever he says when he wants a piece rejected?

A. The final disposition is always——

Q. Now, wait. Just tell me from the bottom up. What does the inspector do?

A. Well, if an inspector has a part that is to be rejected—I could make recommendations but not—

Q. Just tell me what the man does. What does the inspector do if he gets a piece of material that he thinks should be [343] rejected; what does he do with that?

A. He may call me over and show it to me; that is the first thing he would do. And I would say, "Put that aside, for final disposition."

Q. Then what happens?

A. And the chief inspector makes the final disposition, if it is a deviation of a minor nature. If it is a deviation of a serious nature, then the piece goes to salvage board.

Q. Now, you say the chief inspector is Mr. Williams? A. Mr. Williams.

Q. And when Williams isn't there, what happens?

(Testimony of Earl H. Friar.)

A. The same thing. It would be held until he came back.

Q. For as many days as he is away?

A. Yes.

Q. The people in the other parts continue to make these pieces, even though there is a defect?

A. We have a chief engineer who formerly could make the final disposition. In the case when Mr. Williams is on his vacation the chief engineer would make the disposition.

Q. When there is a defect and Williams isn't there, do you call up the production department and tell them to reject a certain piece?

A. No, never.

Q. Whom do you tell that a certain piece is faulty?

A. That case has never come up. It has never been of such [344] a nature it couldn't wait until Mr. Williams got back, as far as **I can remember**.

Trial Examiner Myers: Go ahead.

Q. (By Mr. Harrington) I show you this affidavit. Is this your signature (indicating)?

A. Yes, it is.

Q. Is that your handwriting?

A. That is my handwriting.

Q. Are these your initials (indicating)?

A. Yes.

Trial Examiner Myers: Did you sign that?

The Witness: Yes, sir.

Mr. Harrington: Does counsel wish to see it?

Mr. Proctor: Yes.

(Testimony of Earl H. Friar.)

Mr. Collins: Yes.

Q. (By Mr. Harrington) Mr. Friar, I ask you to read the third paragraph there (indicating).

A. "I have worked at Kinner Motors——"

Q. No. Read it to yourself.

A. Oh, all right.

Q. Having read this statement or paragraph, Mr. Friar, will you now state whether or not you are a foreman?

A. I would like to qualify that. That statement was due to a false impression. It has never been official, that is, there never has been a statement to the effect, signed by the [345] plant supervisor, so that this was a false impression about just exactly what were the duties of a foreman. And I have since learned I was mistaken at the time I made that statement.

Q. What do you mean by this statement: "Until about a week ago I was not classified as a foreman"? Have you been classified as a foreman?

A. No, it was never official.

Q. Why wasn't it?

A. It would have become official if the plant supervisor had signed the statement or the authorization, but it was never signed. This statement was taken before that became official, and it was never signed.

Q. What was the authorization you refer to?

A. There was an attempt to clarify the status of certain leadmen or men who took more responsibility in the plant.

(Testimony of Earl H. Friar.)

Trial Examiner Myers: When was this?

The Witness: That was just prior to the time of this statement, if you will look at the date there. I think you will find it was perhaps within a week before, September——

Q. (By Mr. Harrington) The statement is dated September 8, 1943.

Who made the attempt to classify you?

A. I really don't know.

Q. (By Trial Examiner Myers) You say there was some card [346] that was supposed to be signed by the superintendent? Is that what you said?

A. Yes.

Q. What is that man's name, the man you just said was superintendent?

A. It would be Walter G. Milka.

Q. Did you put anything on that card, you, yourself? A. No, sir.

Q. Do you know who did? A. No, I don't.

Q. Did you ever see the card?

A. No, I think it was on the bulletin board. [347]

Q. In your affidavit you said, "I make recommendations for wage increases for the employees under my supervision, and I make these to the chief inspector."

A. That should be clarified.

Q. Will you please clarify it?

A. All right. I can't go to the chief inspector and say, "I think that man should have a 5 cent raise." I can go and say, "This man is doing fine work. I think he should have a raise." I can't

(Testimony of Earl H. Friar.)

go to him and say, "Give him a 5 cent raise." I can say, "Such-and-such a man is doing fine work and should [348] have a raise." If that is what you mean by raise. In other words, I have no authority.

Q. Do you have authority to hire and fire employees? A. No, sir.

Q. Do you have authority to make any such recommendations? A. No, sir.

Q. In your statement, when you said, "I have no authority to hire and fire employees, but I can make recommendations to the chief inspector," what do you mean by that?

A. That same clarification would apply there, as applied to raises, and so forth.

Trial Examiner Myers: Does that apply since you had this job as so-called leadman?

The Witness: Yes, sir.

Q. (By Mr. Harrington) When did you first hear of the Kinner Motors Employees Association?

A. Well, that is pretty hard to fix the date exactly.

Q. As closely as you can fix it.

A. It was early—early in the year, as near as I can remember.

Q. Can you place the month?

A. No, I can't.

Q. Whom did you first hear about it from?

A. Jack Williams.

Q. In what manner did you hear about it from Jack Williams? [349]

(Testimony of Earl H. Friar.)

A. He came into the inspection department and I believe it was during the smoking period and told us that he was canvassing the shop to see how many would be interested in an employees association.

Q. Did he ask you to join?

A. He didn't ask me to join. He just sounded me out, to see what my opinion was, and what my impression of the idea was.

Q. Did you join the Association at that time?

A. I paid the initiation fees. And about that time I was given the impression I was a foreman, so I haven't paid any dues since, nor I haven't attended any of the meetings.

Q. Have you ever discussed the Association with any other employees?

A. Only in a general sort of way, just like we discuss the war or any current topics.

Q. Could you place the time of these discussions?

A. No, I can't.

Q. What did you say in these discussions?

A. Well, I believe I favored the employees association.

Q. Did you say that? A. I think I did.

Q. Did you say anything else?

A. Only along that line.

Q. Where were these conversations held? [350]

A. In the inspection department.

Q. When?

A. Usually during smoking period.

Q. (By Trial Examiner Myers): Do you smoke right in the department——

(Testimony of Earl H. Friar.)

A. I don't smoke.

Q. —during the smoking period?

A. No.

Q. Where do they go?

A. Outside the building. There are several members of the department that don't smoke.

Q. They are not allowed to smoke where they work, even during the smoking period?

A. No.

Q. (By Mr. Harrington): Were any of these discussions held during working hours?

A. No, I don't think so.

Q. Are you still a member of the Association?

A. Not an active member. I haven't paid dues since I paid the initiation fee.

Q. I see. Have you ever told any official of the Association that you wanted to withdraw from it?

A. No.

Q. You have never attempted to resign from it?

A. No. [351]

Mr. Harrington: No further questions. [352]

CLIFTON EDMOND MALAMPHEY

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Clifton Edmond Malamphey.

(Testimony of Clifton Edmond Malamphay.)

Trial Examiner Myers: Will you please spell your entire name for the record?

The Witness: C-l-i-f-t-o-n E-d-m-o-n-d M-a-l-a-m-p-h-e-y.

Trial Examiner Myers: Where do you live?

[357]

The Witness: 2019 Chilton Drive, Glendale.

Trial Examiner Myers: You may be seated.

You may proceed, Mr. Harrington.

Q. (By Mr. Harrington): Are you employed by Kinner Motors? A. Yes, sir.

Q. How long have you been employed by Kinner Motors? A. About 15 years, I believe.

Q. What type of work do you do?

A. Tool maker.

Q. Do you have any employees under your supervision?

A. Well, like the last witness, I am a so-called leadman in the tool room.

Q. (By Trial Examiner Myers) Who so calls you that?

A. I will tell you, it is like this: We had a large project coming up, and my foreman needed some help in making out material slips. He told me he wanted me to help him, and from then I have.

Q. And when you say you are a so-called leadman——

A. There is nothing official.

Q. How do you know it is so-called? Does anybody call you a leadman?

A. Yes, I have been called leadman by employees.

(Testimony of Clifton Edmond Malamphey.)

Q. When you refer to a so-called pretty girl, what does that mean? Somebody has said she was a pretty girl? Is that what you mean? [358]

A. They are all entitled to their opinion.

Q. What is your opinion about your job?

A. I believe I am a leadman.

Q. (By Mr. Harrington): How many employees are working in your department?

A. Eight. [359]

Q. (By Mr. Harrington): Do you exercise any supervision over those employees? A. Yes.

Q. Tell us about an average day?

A. I usually come in the morning and if there is work left [360] by the night shift and it has to go out for plating or heat treating, I make out the slips for that, and send it out. If any small jobs come in to be worked on, I make a note of it for the foreman, and when he comes in if he sees fit to do it now, he does, and if he don't he puts it aside. The tool room is more or less the heart of the plant, and that continues all day long.

Mr. Proctor: Excuse me. What did you say about a Harvard plant?

The Witness: I say it is the heart of the plant.

Trial Examiner Myers: H-e-a-r-t.

Mr. Proctor: Excuse me.

Q. (By Mr. Harrington): How many buildings are there in the plant?

A. There are four. There is one long building that has a succession of buildings that adjoin each other. There are five, that is; the test plant, too.

(Testimony of Clifton Edmond Malamphey.)

Q. Is there a part called Plant two?

A. Yes.

Q. When was that put into operation?

A. The first of this year, I believe.

Q. Who was in charge of that when it first went into operation?

A. It was under the supervision of Plant 1, as far as I know. [361]

Q. Did you ever work in Plant 2?

A. Yes, sir.

Q. When?

A. I believe it was last summer. I don't know the date.

Q. What did you do in Plant 2, when you worked there?

A. I took the place of the foreman in Plant 2, tool room. I was working under my foreman in Plant 1.

Q. Where was the foreman when you took his place?

A. He took a vacation.

Q. When you took his place, what did you do?

A. Well, just the same as I am doing now. I was still working for Ross Nichols, my boss.

Q. How many employees were there in Plant 2 at that time?

A. I would say 10.

Q. Was there any supervisor in Plant 2?

A. Was there at that time?

Q. Yes. [362]

Q. What was Hutchins' job about the first of January?

A. Well, I guess you would call him foreman in the tool room at Plant 2.

(Testimony of Clifton Edmond Malamphey.)

Q. What was your job at that time?

A. The same as it is now.

Q. What is that? A. Leadman.

Q. All right. Now, Hutchins went on his vacation, and what happened?

A. I was taken over to Plant 2 and introduced to the fellows, and told them if they needed any help I would be there to help them.

Q. Who said that? A. Ross Nichols.

Q. And you stayed at Plant 2?

A. Yes, sir.

Q. What else did you do? A. That is all.

Q. You stayed in the tool room at Plant 2?

A. Yes.

Q. How long was Hutchins away?

A. Two weeks.

Q. During those two weeks, what did you do?

A. We were building jigs fixtures for Plant 2.

Q. And who had charge of the building of them?

[364]

A. I really don't know. I worked under Ross Nichols, and that is the only one I saw.

Q. What did Ross Nichols do? Did he ever say anything to you during those two weeks about the work?

A. Oh, yes, absolutely. He was over there every day.

Q. What did he say?

A. Well, he would come around and see how things were going. If they weren't right, why, he would say so. And if they were, why,—

(Testimony of Clifton Edmond Malamphey.)

Q. What I am interested in is what he said to you during those two weeks.

A. Well, just a matter of business.

Q. Yes, I know. That is what I am interested in, what he said to you about that tool room in Plant 2 during that two week period.

A. Well, he said I did a good job.
Plant 2 during that two week period.

A. I don't think I understand what you mean.

Q. Hutchins was away? A. That is right.

Q. And you were over at Plant 2?

A. Yes, sir.

Q. In the tool room? A. Yes.

Q. Every once in awhile Mr. Nichols would come over? [365] A. That is right.

Q. On those trips did he ever say anything to you?

A. We would go around together, yes, sir. I don't know the exact words he said.

Q. I know you can't remember the exact words. Tell us what would happen when Nichols would come over in the tool room in Plant 2.

A. I would show him what we were doing, go from machine to machine and show him how the work was progressing.

Q. Yes.

A. And that is all there would be to it.

Q. Did any of the other tool men do that with Nichols? Did they go around and show him the work the other people were doing? A. No.

Q. You were the only one during that two weeks period doing that? A. Yes.

(Testimony of Clifton Edmond Malamphey.)

Q. What else did you do?

A. Well, if we needed——

Q. While Nichols was there?

A. I told him if we needed the supplies, why, tell him.

Q. Did any of the other employees, who were in that tool room, ask Nichols for supplies when you needed supplies?

A. I couldn't say. [366]

Q. Did you hear them say that?

A. No, sir.

Q. You are the only one, so far as you know who asked Nichols for supplies during that two weeks period; is that right?

A. As far as I know, yes.

Q. Now, what else took place between you and Nichols during that two weeks period?

A. Not a thing.

Q. That is about all you did with Nichols; is that right?

A. Yes.

Q. What did you do with the other men in the tool room at Plant 2?

A. When I went over there they all had their jobs. And in fact, the two weeks I was there I believe they were still working on the same job as when I came in; they were still working on the same job.

Q. What did you do?

A. I practically did nothing, except walk around.

Q. When you walked around, what were you doing? What were you looking at?

A. Blueprints, parts.

Q. What was the purpose of doing that?

(Testimony of Clifton Edmond Malamphey.)

A. Well, they had to have someone there in case the phone rang, or something. [367]

Q. Well, you didn't need the blueprints to answer the phone. I am talking about the blueprints.

A. Naturally, you are interested in what they were doing.

Q. You were over there for a purpose; weren't you?

A. I was over there to keep the tool room going, and as it was it ran smoothly and nothing happened.

Q. And you looked at the blueprint and looked at the man's work; is that correct? A. Yes.

Q. To see whether the man was doing the work according to the blueprint? A. That is right.

Q. And anything else? A. That is all.

Q. When they wanted some instructions they called on you, did they? A. Yes, sir.

Q. They didn't call on each other? A. No.

Q. Did they call on Nichols for instructions

A. I had to send for him a couple of times, yes.

Q. When you couldn't answer their questions you sent for Nichols? A. That is right.

Q. Did any of the other employees in that tool room send for [368] Nichols, that you know of, during that two weeks period? A. No, sir.

Trial Examiner Myers: Go ahead, Mr. Harrington.

Q. (By Mr. Harrington): Did Mr. Nichols take a vacation this year? A. Yes, sir.

Q. When was it? A. July.

(Testimony of Clifton Edmond Malamphey.)

Q. Who took his place while he was on his vacation? A. I did.

Q. And what did you do at that time?

A. I did the same thing I am doing right now.

Q. Whom did you report to when Mr. Nichols was on his vacation? A. Mr. Davey.

Q. Can you describe the work you did while Mr. Nichols was away?

A. You mean the actual work we did?

Q. That you did.

A. I did the same thing I am doing now. If a job had to be done, I would give it to one of the workmen in the tool room, and he would put the work out. [369]

Q. (By Mr. Harrington): Are you a member of the Kinner Motors Employees Association?

A. Yes, sir.

Q. When did you join it?

A. When it was first organized.

Q. Where did you join it?

A. At the plant.

Q. Who asked you to join it?

A. Jack Williams.

Q. At what time was it when he asked you?

A. What time of day?

Q. Yes. Was it during working hours?

A. I believe it was.

Q. Did you discuss the Association with anybody else before you joined it?

A. I don't believe so, not before I joined it, no,—oh, yes. Of course, the discussion was going around the shop, everyone was talking about it.

(Testimony of Clifton Edmond Malamphey.)

Q. Did you discuss it with Mr. Nichols?

A. Yes, sir.

Q. When was that discussion?

A. Right around the first—before they had their first meeting.

Q. Where did you discuss it with him?

A. Right in the tool room. [372]

Q. Who was present?

A. I don't know. I guess——

Q. Will you relate that discussion?

Trial Examiner Myers: When he says, "Who was present?" he means in close proximity to where you and Nichols were. Is that what you mean?

Mr. Harrington: Yes.

The Witness: There was no one else in the conversation.

Q. (By Mr. Harrington) What was the conversation?

A. Well, at the time, being a leadman, I didn't know whether I could belong to the Association or not, so I asked Nick before I knew whether I could or not. I didn't ask him, I talked to him about it.

Q. What did you say?

A. I asked him if it would be advisable to join.

Q. And what did he say?

A. He said so far as he was concerned it was all right.

Q. Why did you ask Mr. Nichols?

A. Well, being a leadman you are in a funny position——

Mr. Proctor: If you Honor please, I would like

(Testimony of Clifton Edmond Malamphey.)

to interject an objection at this time, unless they can prove that Ross Nichols is the supervisor and within the terms of the law is ineligible to belong to this union; any conversation had between this gentleman and Nichols is purely hearsay.

Trial Examiner Myers: The objection is overruled. [373]

Will the reporter please read the question to the witness?

(The record was read.)

Q. (By Mr. Harrington): Do you want to continue your answer?

A. Well, as I say, you're in between the men and the foreman, himself. Well, I don't know, it seems to me it is an odd position to belong to the same organization as the men in the shop.

Q. Did Mr. Nichols say anything about leadmen in that conversation? A. No, he didn't.

Q. Have you discussed the Association with any other employees? A. Yes, I have.

Q. When?

A. Oh, when it was first organized. There were discussions going on all the time, of course.

Q. Have you discussed it with other employees all the time? A. No, I haven't.

Q. Have you discussed it with other employees since the Association was formed?

A. Why, yes, the conversation comes up every once in awhile in the tool room.

Q. When did you last discuss it with other employees? A. Well, I don't know. [374]

(Testimony of Clifton Edmond Malamphey.)

Q. (By Mr. Harrington) When was the first conversation with other employees?

Trial Examiner Myers: I will sustain the objection.

The Witness: When was the first conversation?

Q. (By Mr. Harrington) Yes, you had with other employees?

A. When the organization was first started was the first conversation.

Q. Whom did you discuss it with at that time?

A. Just the fellows in the tool room.

Q. Who were they?

A. Do you want the names?

Mr. Collins: Who were they? I didn't catch the names.

Mr. Harrington: Yes. He hasn't given them yet.

Q. (By Mr. Harrington) Who were they?

A. A fellow named Jack Shelly, Glenn Gilmore, Ralph Graytricks, Jim Davis and Louis Gilpin, Jim Calhoun, Earl Venier; that is about all, I guess.

Q. Will you describe that conversation? What did you say in that conversation?

A. Shucks, it is kind of hard to know what you said in a [375] conversation.

Mr. Collins: I object to any conversation——

Q. (By Mr. Harrington) As closely as you can recall.

Mr. Collins: ——as being incompetent, irrelevant and immaterial, as to what these employees might talk about among themselves. We could

(Testimony of Clifton Edmond Malamphey.)

be here a couple of years if every conversation the employees had about the union, among themselves, could be material.

Trial Examiner Myers: The objection is overruled.

Mr. Collins: I wish the record to show there is absolutely no foundation in it at all, as to who these men are.

Trial Examiner Myers: Overruled.

Q. (By Trial Examiner Myers): Are these men employees of the company? A. Yes, sir.

Q. In your department? A. Yes. [376]

Q. (By Mr. Harrington) Not the exact words, just as close as you can recall what you said.

A. First of all, the conversation was about why we should have an organization. And, of course, we knew that another organization was trying to get in, and the subject came up about what benefits we could derive from having an organization of our own and how much weight it would hold. Of course we have pro and con on that.

Q. What did you say?

A. I was in favor of it. [377]

Q. You have no right of discipline?

A. No, sir.

Q. You can't shift a man from the day shift to the night shift? A. No, sir.

Q. Now, when this man Bill Clark asked you about the union, did you tell him he should join it or he had to join it? A. No, sir.

Q. Did you tell him he must join it?

(Testimony of Clifton Edmond Malamphey.)

A. No, sir.

Q. Did you tell him that it was advisable that he join it? A. No.

Q. You merely said if he wanted to join it he would be welcome, I think that is the language you used? A. That is right.

Q. He was the one that asked you if there was a union? A. Yes.

Q. You didn't bring the subject up to him?

A. No, sir.

Mr. Collins: That is all.

Trial Examiner Myers: Mr. Proctor, do you have any questions?

Mr. Proctor: No questions.

Trial Examiner Myers: You are excused. You may go back to the plant. [406]

WILBUR J. KROENING

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Wilbur J. Kroening.

Trial Examiner Myers: Will you spell your name for the record?

The Witness: W-i-l-b-u-r J. K-r-o-e-n-i-n-g.

Trial Examiner Myers: Where do you live?

The Witness: 410A Riverside, Glendale.

Trial Examiner Myers: You may be seated, sir.

(Testimony of Wilbur J. Kroening.)

You may proceed, Mr. Harrington.

Q. (By Mr. Harrington) Are you employed by Kinner Motors? A. I am.

Q. How long have you been employed by Kinner Motors? A. Just a little over two years.

Q. What is your position in the plant?

A. I am test mechanic.

A. A what? A. A test mechanic. [407]

Q. As test mechanic, what does your work consist of?

A. Well, it involves installing and removing of engines from the stand, running of them, making the required readings and adjustments.

Q. How long have you held that position?

A. I started in that department when I went there.

Q. Have you been on that job all the time?

A. That is right.

Q. Who is your immediate superior?

A. Fritz Gerber.

Q. Have you ever asked Mr. Gerber what your classification in the plant was?

A. I think I did one time when it was necessary to send some information to the Draft Board.

Q. When was that?

A. I can't say. I think it was in August some time.

Trial Examiner Myers: This year?

The Witness: The middle of August, 1943.

Q. (By Mr. Harrington) What did he tell you at that time that your classification was?

(Testimony of Wilbur J. Kroening.)

A. He told me at that time my classification was foreman.

Q. Are there any employees working under your supervision? A. Yes.

Q. How many?

A. You mean at that time or at the present time? [408]

Q. At that time?

A. Oh, I don't know, 6 or 8.

Trial Examiner Myers: How many?

The Witness: 6 or 8, some place in that vicinity..

Q. (By Mr. Harrington) Has that number changed? A. It has, yes.

Q. What was the highest number of employees that were under you?

A. I think the highest number was 9, possibly 10. I wouldn't say for sure.

Q. When was that?

A. I can't say just when that date was, I forget. It was the forepart of the summer.

Q. What was the lowest number of employees under your supervision?

A. At the present time it is 3.

Mr. Proctor: I will object to the word "supervision" wherever it appears. I move it be stricken and all answers in regard to that be stricken.

Trial Examiner Myers: It is too late now. I am not going back and pick out what you want stricken.

Mr. Proctor: The last one.

Trial Examiner Myers: I will grant the motion then.

(Testimony of Wilbur J. Kroening.)

Q. (By Mr. Harrington): What connection do you have with the work of these people? [409]

A. Beg pardon?

Q. What connection do you have with the work of these people?

A. Well, I more or less work right with them. I do approximately the same work they do. I do, however, check the engines from time to time, and more or less observe how they are going on.

Q. Do you give instructions to those people?

A. I do to new employees, yes.

Q. Do you give instructions to the other employees?

A. Not after they have once been instructed, no.

Q. Have you ever recommended wage increases for any employees?

A. I have recommended some, yes.

Q. Whom did you recommend them to?

A. Fritz Gerber.

Q. Have you ever recommended any increases for employees without consulting Gerber?

A. I never have.

Q. Do you have any authority to recommend firing of employees? A. No.

Q. Do you ever report on the work of the people? A. No.

Q. Mr. Kroening, I show you an affidavit. Is this your [410] signature (indicating)?

A. That is right.

Q. Did you sign it? A. Yes.

Q. Is this your initial on each page of this (indicating)? A. It is.

(Testimony of Wilbur J. Kroening.)

Q. Did you place it there? A. Yes.

Q. Will you read this, read it to yourself, from here down, starting here (indicating)?

A. Yes. This explains this part here (indicating).

Q. Yes. Now, having looked at this portion of your affidavit, have you recommended wage increases to Mr. Kuhn?

Mr. Proctor: I object to that on the ground it has been asked and answered. He said he had not to anybody except Gerber.

Trial Examiner Myers: He said he had.

Mr. Proctor: That is right, to nobody excepting.

Trial Examiner Myers: I will overrule the objection.

Q. (By Mr. Harrington): Have you recommended increases for employees without consulting Mr. Gerber?

Mr. Proctor: I object to this line of questioning. The affidavit itself shows in one place Mr.—

Mr. Harrington: I have had the witness read both things.

Mr. Proctor: I don't care. I object to this line of [411] questioning because the affidavit itself shows definitely Mr. Ogren has written a statement contrary to this man's testimony and has placed an X in the margin and the margin shows Mr. Ogren's statement is incorrect.

Mr. Collins: I would like the record to show an objection on the further ground that counsel has a most unique method, which is contrary to any line I have ever seen in any judicial proceeding, of con-

(Testimony of Wilbur J. Kroening.)

stantly impeaching his own witnesses. These people are his own witnesses and these statements are taken down by Mr. Ogren as an examiner of this department. It is obvious it is a very difficult thing for anybody, in interpreting something in an office, or some place where he did this, to get it correctly. These people are not business men, in the sense they are used to signing affidavits, and they think Mr. Ogren is an examiner of this Board, and when they get through——

Trial Examiner Myers: Let's not go——

Mr. Collins: I want it in the record.

Trial Examiner Myers: Let's not go into what these people had in their minds when they are talking to somebody, when you aren't even there.

Mr. Collins: I have a right to put it in my objection.

Trial Examiner Myers: I don't want to go into the question here.

Mr. Collins: I want this in my objection. I have an [412] objection.

Trial Examiner Myers: Go ahead.

Mr. Collins: Naturally, the witness thinks he has properly taken down the affidavit, and signs these affidavits. Now, what counsel is doing here is putting a man on the witness stand, as his own witness, and these witnesses have testified. Then he starts in to try to impeach them by an affidavit that was written out by Mr. Ogren; **his own witness.**

I object to it as a procedure which is contrary to every rule of evidence.

(Testimony of Wilbur J. Kroening.)

Trial Examiner Myers: The objection is overruled.

Q. (By Mr. Harrington) Did you read this affidavit before you signed it?

A. I read it and a few changes are made, which are noted on the side, and I signed it.

Q. That is right. That is what I was asking you about. Having read this affidavit, did you recommend increases for employees without consulting with Mr. Gerber?

Mr. Proctor: I object to that on the ground it has been asked and answered.

Trial Examiner Myers: Does it refresh your recollection that you did so and so? I will sustain the objection.

Q. (By Mr. Harrington): Does it refresh your recollection?

A. I made my recommendations to Fritz Gerber.

Trial Examiner Myers: Strike out the answer. I sus- [413] tain the objection to the question. Reframe your question.

Q. (By Mr. Harrington) Having read this affidavit, does it refresh your recollection whether or not you made any recommendations for wage increases without consulting Mr. Gerber?

Mr. Collins: Same objection, an attempt to impeach his own witness.

Trial Examiner Myers: The objection is overruled.

The Witness: I don't know how I can answer that question. I make my recommendations to Mr.

(Testimony of Wilbur J. Kroening.)

Gerber, and yet I make them without consulting him. After all, I talked with the man when I made the recommendations.

Q. (By Mr. Harrington) Do you make your recommendations to Mr. Gerber?

A. I do, yes.

Trial Examiner Myers: What men?

The Witness: Beg pardon?

Trial Examiner Myers: What men have you recommended to Mr. Gerber for wage increases?

The Witness: Several of them that are working in my department that I have an opportunity to see how they are getting along with the work.

Trial Examiner Myers: What happened? Do you know of any cases where they got the wage increase?

The Witness: I think in several cases they have. [414] Whether it was due to my recommendations or not I do not know.

Q. (By Mr. Harrington) Are you a member of the Kinner Motor Employees Association?

A. I haven't paid my dues for some time now or attended a meeting. I don't know whether I am classed as a member or not. I don't think so.

Q. Did you join it? A. I did join, yes.

Q. When did you join it?

A. I can't remember just what the date was on that.

Trial Examiner Myers: Do you know what month it was?

(Testimony of Wilbur J. Kroening.)

The Witness: At the present time I can't say what month it was. [415]

(Thereupon, the document referred to, heretofore marked Board's Exhibit 11, for identification, was received in evidence.) [416]

BOARD'S EXHIBIT No. 11

I, the undersigned, hereby designate and appoint Kinner Motors Employees' Association, Inc., as my exclusive bargaining agent under and by virtue of the terms of the National Labor Relations Act.

Dated this 21 day of April, 1943.

W. J. KROENING.

Q. (By Mr. Harrington) Have you paid dues in the Association?

A. I paid dues, I think, two different times.

Q. What times were they?

A. One was when the Association was first organized and one time since then, I can't say. I can't give the specific date in either case.

Q. Have you paid an initiation fee to the Association? A. Yes.

Q. Have you signed up any employees in the Association?

A. No, I haven't. I talked with a couple of them, but I didn't sign them up, as far as I know. I don't know whether they signed or not. [418]

Q. Who were the employees you talked to?

(Testimony of Wilbur J. Kroening.)

A. Guy Price, John Girdelstone, James Wilson.

Q. Where did you talk to them?

A. In the test department, or out at our area where we are allowed to smoke.

Q. When was it, do you know?

A. It evidently was where we smoked, because there is too much noise to talk about it right on the job.

Q. When did you talk to them?

A. I don't know.

Trial Examiner Myers: Where do these three men work?

The Witness: They work in the test department.

Q. (By Mr. Harrington) What did you say to those three men?

Mr. Collins: I object to that. It is incompetent, irrelevant and immaterial what the members of the employees might say among themselves. It certainly is binding on Kinner Motors, Inc.

Trial Examiner Myers: The objection is overruled.

The Witness: You mean in regard to the——

Q. (By Mr. Harrington) In regard to joining the Association.

A. Well, I just told them I thought it was—as far as I was concerned it was all right, that it looked like we were going to have representation of some kind and I thought Em- [419] ployees Association would be much better than some outside union.

Q. Did you give them authorization cards?

A. I did. [420]

JAMES F. BROWN

called as a witness by and on behalf of the Nation Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: James F. Brown.

Trial Examiner Myers: Spell your last name for the record.

The Witness: B-r-o-w-n.

Trial Examiner Myers: Where do you live, Mr. Brown?

The Witness: 1126 East Doran, Glendale.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Harrington.

Q. (By Mr. Harrington): Are you employed by Kinner Motors, Mr. Brown?

A. I am.

Q. How long have you been employed by them?

A. Nine or ten years.

Q. What is your present position in the plant?

A. Leadman; another one.

Trial Examiner Myers: Is he going to testify to the same line? Isn't this accumulative? He joined the Association, is that it?

Mr. Harrington: Yes. [424]

Trial Examiner Myers: All right.

Mr. Harrington: And he also is an official in the Association, Mr. Examiner.

Trial Examiner Myers: All right. Go ahead.

Q. (By Mr. Harrington): How long have you

(Testimony of James F. Brown.)

been leadman?

A. Since about August 1st of this year.

Q. As leadman, what do you do?

Trial Examiner Myers: We have that so often, what these fellows testified. Is he going to testify to something else?

Mr. Harrington: Not with respect to his duties as leadman, Mr. Examiner.

Q. (By Mr. Harrington): Are you a member of Kinner Motors Employees Association?

A. I am.

Q. Are you an official of the Association?

A. Director.

Q. As Director have you attended any meetings between the Association and the company?

A. Yes, I have.

Q. How long have been Director?

A. I was in the last term, and voted in this term.

Q. What do you mean by the "last term"?

A. Well, the last six months, I believe, it was; whenever the company started in — I mean the union.

Q. In other words, have you been a Director since the [425] inception of the Association?

A. That is right, since it first started.

Q. Up to the present time? A. Yes. [426]

BRIAN C. JOHNSON

called as a witness by and on behalf of the company, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Brian C. Johnson.

Trial Examiner Myers: Will you please spell your last name for the record?

The Witness: J-o-h-n-s-o-n.

Trial Examiner Myers: Where do you live Mr. Johnson?

The Witness: 210 North Serrano, Los Angeles.

Trial Examiner Myers: You may be seated. You may proceed, Mr. Collins.

Q. (By Mr. Collins): What is your business, Mr. Johnson?

A. I am foreman at Kinner Motors, night foreman.

Q. What plant?

A. I am in Plant No. 1.

Q. Of Kinner Motors?

A. Kinner Motors' Company.

Q. Kinner Motors, Inc.? A. Yes. [450]

Q. First of all, do you know Roy Walker?

A. Oh, yes, of course.

Q. What is his work?

A. Roy Walker is a drill press operator.

Q. Is he assistant foreman?

A. I don't have any assistant foreman.

Q. Has he any authority of any kind or char-

(Testimony of Brian C. Johnson.)

acter in relation to supervision of employees?

A. Absolutely no.

Q. Did you ever hear Mr. Walker, at any time, make a speech or say a few words to several of the employees?

A. Yes. One night he did make a speech, but I wasn't there because it was just about the time for the boys to go to work after their lunch period. We have a big machine that we call [452] the whole hogger. It makes quite a noise. It makes a noise like a foghorn, but much louder. I always used to start that—we had no horn or whistle, I started that to get the boys going. I stepped over, when I saw Roy stand up there and start some kind of a gabble, I started over and started the whole hogger. It was about time for them to go to work. By the time I got down to the end of the shop and back the boys were dropping around to their various machines.

Q. Did you hear what he said?

A. I didn't hear anything he said. [453]

Q. Does it refresh your recollection whether or not Walker is in charge in your place on the nights you are absent?

A. Whatever you mean by being in charge, naturally, he is in charge in the keys, and he is the only man in the shop that—in fact, he is top man when I am gone; he is not foreman. [460]

EMMETT J. SULLIVAN

called as a witness by and on behalf of the company, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Myers: What is your name?

The Witness: Emmett J. Sullivan.

Trial Examiner Myers: Spell your last name for the record.

The Witness: S-u-l-l-i-v-a-n.

Trial Examiner Myers: Where do you live?

The Witness: 1420 North Columbus, Glendale.

Trial Examiner Myers: You may be seated, sir. You may proceed, Mr. Collins.

Q. (By Mr. Collins): What is your business, Mr. Sullivan? [466]

A. My title is director of personnel for Kinner Motors, Inc.

Q. And how long have you been in that capacity? A. Since August 1, 1942.

Q. How long have you been employed by Kinner Motors, Inc.?

A. Since that same date.

Q. The same date? A. Yes. [467]

Q. I show you Orville Gilbert's record, and ask you to tell us his personnel record.

A. Beginning March 17, 1941, Mr. Orville Gilbert has been a boring machine operator from March 17th until November 20, 1942. At that time he was classified as a boring machine leadman. From 1942, November 20th, to July 16, 1943,

(Testimony of Emmett J. Sullivan.)

he was reclassified to an all round machinist, which rate he now carries. [474]

Q. How about Albert William Gardiner?

A. Albert William Gardiner, March 17, 1941, to July 16, 1943, as a machinist; and classified on July 16th to a leadman on engine lathes; from July 16th to November 1, 1943, reclassified to all round machinist, and the leadman classification cancelled. That was written on that one.

Q. Wilbur John Kroening?

A. November 26, 1941, hired as an engine test mechanic; to July 23rd; then we show a reclassification as a sub-foreman of the test stands.

Mr. Harrington: What year was that?

The Witness: July 23, 1942.

Mr. Harrington: 1942.

The Witness: That is right. Sub-foreman of the test stands; carried that rating to January 1, 1943; reclassified to test stand operator.

Mr. Harrington: What was that last date?

The Witness: January 1, 1943. Reclassified to test stand operator; carried that test stand operator classification until August 16, 1943; reclassified to leadman; that is [475] the classification he now holds.

Q. Thomas H. Mills.

A. Thomas H. Mills. Hired February 25, 1943, as machinist Class C. July 16—

Trial Examiner Myers: What does Class C mean?

The Witness: That is the beginning of the classi-

(Testimony of Emmett J. Sullivan.)

fication, the lowest. He carried that classification until July 16, 1943; he was then classified as a milling machine operator. His rate is irrelevant, but under date—he carried the milling machine operator rate until October 4, 1943; and the only other record shows he was transferred from the night to the day shift and given a five cent bonus. He is still a milling machine operator; that is his present classification.

Trial Examiner Myers: You pay the night men——

The Witness: 5 cents an hour——

Trial Examiner Myers: More?

The Witness: Yes.

Q. (By Mr. Collins): Mr. Earl Herman Friar?

A. Going back to the beginning, July 1, 1943, Earl Friar hired as an inspector; he carried that rating until August 16, 1943, when he was made—wait—this is August 16th. This doesn't jibe.

Q. This is November and this is August (indicating)?

A. There are two changes. August 16th. There is no change [476] showing this (indicating).

Q. This must be here, the effective date.

A. November 16, 1943.

Q. Speak up so they can hear you.

A. Until November 16, 1943, he was classified as a receiving inspection foreman.

Trial Examiner Myers: From when to when?

The Witness: From August 16th—August 16th

(Testimony of Emmett J. Sullivan.)

was his last rating. On November 16th he was reclassified as a receiving inspection foreman.

Trial Examiner Myers: Let us take Friar's record again. What was this now?

The Witness: From July 1, 1941, he was classified as an inspector; carries that rate, goes through all his hourly rate changes, same rating until November 16, 1943. He was made a receiving inspection foreman then, tool, gauges and jigs inspector.

Trial Examiner Myers: What is Williams' classification, George Williams?

The Witness: George Williams is the chief inspector of Plant 1. We have two chief inspectors, one at each plant.

Trial Examiner Myers: How long has George Williams had that classification?

A. Since 1941—since April, 1941. George was made chief inspector of Plant 1. George has been chief inspector since [477] 1941 of Plant 1. [478]

Q. (By Mr. Harrington): I show you the personnel folder of Mr. Wilbur Kroening.

A. Yes. [496]

Q. What was his occupation on March 16, 1943?

A. Test stand operator; changed to same test stand operator but put in charge of the test crew under Fritz Gerber, who is the chief—put in charge——

Q. On change of status notice of May 16, 1943, what is listed as his classification?

A. A merit increase purely, no change of classification.

(Testimony of Emmett J. Sullivan.)

Q. What is listed as the classification?

A. Test stand operator Class A.

Q. Did he hold the same position as on March 16, when he was listed as being in charge of the test crew?

A. He is still a test stand operator, but he was put in charge of the test stands. Now, they didn't call him a foreman or a leadman, or anything like that on that change of status.

Q. I didn't ask you that. On May 16th, when his next change of status notice came, did his duties change?

A. It doesn't show it.

Trial Examiner Myers: Well, did it?

The Witness: I wouldn't know, sir. All I can tell is from these——

Q. (By Mr. Harrington): What is his occupation as listed on May 16, 1943?

A. A test stand operator Class A.

Trial Examiner Myers: That is when he got a merit in- [497] crease?

The Witness: Yes, sir. August 16, that is where he was made leadman. The next time it came through they made him a leadman. That is what he is now.

Q. (By Mr. Harrington): From March 16 to August 16 he was in charge of a test crew under Gerber?

A. According to the change of status notice he was in charge of the test crew; that is correct.

Q. On August 16th he was made the leadman?

A. Yes, officially.

(Testimony of Emmett J. Sullivan.)

Trial Examiner Myers: That is all 1943?

The Witness: Yes.

Q. (By Mr. Harrington): On August 16th, when he was made a leadman, was that the last time the classification was changed?

A. That is the last time I have on record.

Q. I show you the personnel file of Earl Friar. On August 16, 1943, what was his classification?

A. He was precision inspector Class A.

Q. What was his change of status for November 16, 1943?

A. On November 16th he was still an inspector—receiving inspection foreman of tools, gauges and jigs. That is his classification he now holds.

Q. Isn't it true on November 16, 1943, he was changed from receiving inspection foreman to tool, gauge and jib inspector? [498]

A. It would appear there. There is no change to show that.

Q. Isn't that what the change of status notice says?

A. Change of status notice says he was made a receiving inspection foreman on November 16th. There isn't—

Trial Examiner Myers: From what?

Q. (By Mr. Harrington): Doesn't it show on November 16th he was changed from receiving inspection foreman to tool, jig and gauge inspector?

A. That is correct. [499]

Q. I show you the personnel record of Robert

(Testimony of Emmett J. Sullivan.)

L. Stevens. On his change of status notice, dated May 1, 1943, what is given as the reason for the change?

A. Given as the reason for the change, a merit promotion to receiving clerk in charge, and salary increase within the established rate range.

Trial Examiner Myers: How many employees were there in that department at that time?

The Witness: What date, again? I want to be sure of that. May 1st. I would say about 8 in the receiving department.

Trial Examiner Myers: That is on one shift? You only have that open on one shift?

The Witness: Yes, one shift proposition. [501]

Q. (By Mr. Harrington): Showing you the date in the upper right-hand corner of the change of status notice, April 21, 1943, at that time was Mr. Stevens receiving clerk in charge?

A. On the date of April 21st Mr. Stevens' official classification was a checker in the receiving department.

Q. Who placed this reason for the change?

A. Mr. George Blauvalt, head of the department.

Trial Examiner Myers: What does that mean, that he was put in charge of the department?

The Witness: He was made a clerk in the B classification. His classification changed under that date from a checker Class C to a receiving clerk Class B, from 80 to 90 cents per hour.

Q. (By Trial Examiner Myers): That is where

(Testimony of Emmett J. Sullivan.)

they have the notation that he was put in charge of the department?

Mr. Collins: I don't believe that is correct. There was no notation he was put in charge.

Q. (By Trial Examiner Myers): Read what was said.

A. "Reason for the change: Merit promotion to receiving clerk in charge, and salary increase within established rate range."

Q. Does that mean in charge of the department?

A. In charge of the clerks in his classification.

Q. You say there were 8 clerks at that time?

A. As near as I can, without an actual count.

[502]

Q. Approximately?

A. Approximately there would be about 8 people in that department. They wouldn't be clerks. Two or three—there would be two truck drivers, a couple of checkers and one or two clerks, something like that.

Q. Now, when was that change made, as of May 1, 1943? A. May 1, 1943.

Q. That slip is dated April 26, 1941?

A. April 21st.

Q. How many people in that department at the present time, do you know, approximately?

A. It has all been new administration. It has all been revised. I think there are only about three over there, three or four. They revised that; an entirely new set-up [503]

BOARD'S EXHIBIT No. 13

Plant 1

Foremen

Kenneth Freese
Harry Swanson
Howard Williams
Fred Strehlein
Ross Nichols
Ferdinand LaCom
Bud Sorenson
Brian Johnson

Leadmen

Jack Williams
Albert Gardiner
Warren Durbin
Homer Watters
George Orrill

Plant 2

Foremen

Paul Hawkins
Walter Ferguson
Dale Evans

Leadmen

Jack Gilbert
James Brown
Ray Wildman
William Suttie
Howard Sharrar
Joseph Sickells
Frank Gifford
Thomas Mills
Joseph Wilson

Chief Engineer—Jack Kuhn

Test Superintendent—Fritz Gerber

Foremen—

Earl Friar
Charles Noble
W. J. Kroening
Charles Pritchard.

OK as of 9/9/43. E. J. SULLIVAN

Mr. Collins: Yes. I have a motion, if the Court please. I wish at this time, for the record, to renew my motion of dismissal which I made at the very first of the case, and that it is not disclosed—there are no new points raised, no new evidence given that would change what I said is the basis of my motion at the very start of this matter, to-wit: This proceeding was not brought within the ninety days of the contract. As a matter of fact, there is no charge which was filed within that time; that the charge which was filed by the union, the A. F. of L. union, was filed prior to the execution of the agreement. And under those circumstances I believe this proceeding is without jurisdiction.

I renew that motion.

Trial Examiner Myers: Very well. I will reject it, sir. I will deny that motion. You are moving to dismiss?

Mr. Collins: Yes, I would like to add to that——

Trial Examiner Myers: The motion to dismiss on the [559] ground the rider is a bar to these proceedings is denied.

Mr. Collins: I wish, if the Court please, to move to dismiss upon the ground that the complaint itself, in this action, alleges and was also stipulated by all parties that the Kinner Motors Employees Association, Inc. is a duly organized labor organization under Subdivision 5 of Section 2 of the Act.

[560]

I can't close, if the Examiner please, without still harping on my theory of the law in this case

in connection [586] with the lack of jurisdiction.

I have read that law again and it seems to me so clear that there just couldn't be any question in it, in this particular case. For two reasons: First of all, no complaint was filed and I don't believe that any Federal Court, when this matter is passed upon by a Federal Court, will hold that a charge filed with the Board is tantamount and equal to a complaint that is issued by the Board.

Now, we have a rule of interpretation of statutes that you can't read into it something—particularly a Penal statute—you can't read into the statute something that isn't there by import or by some character or language. There isn't a word in this about a charge. It uses the language "complaint."

We must presume, when our Congress passed that, certainly it chose and used the language that it desired to use. We are not bound by the Comptroller General's attempt to use his own argument as to why they should have used another word; why they should have said, "charge." All we have to consider is that they didn't use "charge" and used the word "complaint," so that even there legally I can't possibly see how there is any jurisdiction in this particular case. But the charge was not filed to the particular contract that is a bona fide bargaining agreement between these people. It was filed long prior to the execution of the contract, and no charge was [587] filed, although they had a right to do it. No charge was filed by the A. F. of L. against the contract itself. I think that, in itself, is determinative of this matter.

Again I want to call your attention to the point which I made by way of a motion, which you said, and I can't find the authorities—I haven't been able to find them—your Honor spoke of the other day; there were authorities. But it seems to me if in the complaint they allege that this is a valid union, and then they stipulate it is a union within the purview of sub-section 5 of Section 2, I can't possibly see how once they have stipulated to it, before this Examiner, how they can then turn around and say it is not valid, but is an invalid Association. [588]

[Endorsed]: No. 10956. United States Circuit Court of Appeals for the Ninth Circuit. National Labor Relations Board, Appellant, vs. Kinner Motors, Inc., Appellee. Transcript of Record. Upon Petition for Enforcement of an Order of the National Labor Relations Board.

Filed December 28, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10984

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
KINNER MOTORS, INC.,
Respondent.

Transcript of Record

Upon Petition for Enforcement of an Order of the
National Labor Relations Board.

FILED

MAY 11 - 1945

PAUL P. O'BRIEN,
CLERK

No. 10984

United States
Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

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Transcript of Record

Upon Petition for Enforcement of an Order of the
National Labor Relations Board.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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BOARD'S EXHIBIT No. 1-A

United States of America
Before the National Labor Relations Board
21st Region

Case No. 21 C 2389

Date Filed 3/2/44

In the Matter of—

KINNER MOTORS, INC.

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS, AFL

CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Kinner Motors, Inc. at 635 W. Colorado, Glendale, California, employing 400 workers in manufacture of aircraft motors has engaged in and is engaging in unfair labor practices within the meaning of Section 8 subsections (1) (3) and (4) of said Act, in that on or about the dates hereinafter specified, it, by its officers, agents and employees, terminated the employment of the following tool room employees:

Richard Swope.....February 19, 1944
Lewis Gilpin.....February 24, 1944
F. M. Davis.....February 24, 1944

because of their membership in, and activities on behalf of, the International Association of Ma-

chinists, a labor organization, and because they gave testimony under the Act in the matter of Kinner Motors, Inc., Case No. 21-C-2307, and at all times since said dates it has refused and does now refuse to employ the above-named employees, in violation of Section 8, subsections (3) and (4) of said Act.

By the acts set forth in the paragraph above, and by other acts and statements, the company, by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act, in violation of Section 8, subsection (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

INTERNATIONAL ASSOCIA-
TION OF MACHINISTS,
AFL

By E. R. WHITE
E. R. White,

Grand Lodge Repre., 421 Van Nuys Bldg., Los
Angeles, Calif. Phone: VA-6585.

Subscribed and sworn to before me this 2 day
of March, 1944. At Los Angeles, California.

HELEN W. ELLIS

Helen W. Ellis,

Designated Agent 21st Region, NLRB.

BOARD'S EXHIBIT No. 1-B

United States of America

Before the National Labor Relations Board

Twenty-First Region

Case No. 21-C-2389

in the Matter of

KINNER MOTORS, INC.

and

INTERNATIONAL ASSOCIATION OF MA-
CHINISTS, AFL

COMPLAINT

It having been charged by the International Association of Machinists, AFL, hereinafter called the Union, that Kinner Motors, Inc., hereinafter called the Respondent, has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, approved July 5, 1935, 49 Stat. 449, hereinafter called the Act, the National Labor Relations Board, by the Regional Director for the

Twenty-first Region designated as said agent for the Board by its Rules and Regulations, Series 3, hereby issues its Complaint and alleges the following:

I.

Respondent is, and at all times herein alleged, has been, a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business at 635 West Colorado Boulevard, Glendale, California, where it is engaged in the manufacture of aircraft engine parts and the assembly of aircraft engines.

II.

Respondent, in the course and conduct of its business, as set forth in paragraph I above, causes and has continuously caused large quantities of materials to be purchased and transported in interstate commerce from and through states of the United States other than the State of California to its plants in the State of California, and causes and has continuously caused large quantities of products manufactured at its plants to be sold and transported in interstate commerce into and through states of the United States other than the State of California; more particularly, Respondent did, during the calendar year 1943, in the course and conduct of its business as aforesaid, purchase raw materials valued at more than \$7,000,000, of which amount materials valued at more than \$3,000,000, were transported to the Respondent's plant from points outside California; further, Respondent

during the same period sold and distributed finished products valued at more than \$3,000,000, of which amount finished products valued at more than \$500,000 were made for delivery, and were delivered, by Respondent, to points and persons outside the State of California.

III.

International Association of Machinists, AFL, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

IV.

Respondent while engaged at its place of business at Glendale, as described in paragraphs I and II above, did discharge the following named employees on or about the dates shown opposite each name:

Richard Swope.....	February 19, 1944
Lewis Gilpin.....	February 24, 1944
James M. Davis.....	February 24, 1944

because of their membership in and/or activity on behalf of the Union; and the Respondent failed and refused to reinstate and employ said persons, and has continued in its failure and refusal to employ said persons, since said dates of discharge. Respondent, by its acts and each of them as herein set forth, did discriminate in regard to the hire and tenure of employment of the aforesaid employees and did discourage and is discouraging membership in the Union, and has engaged and is engaging in unfair labor practices within the meaning of Section 8, subsection (3) of the Act.

V.

Further, and without limitation or exclusion of any of the matters set forth in paragraph IV above, Respondent discharged the said James M. Davis on or about February 24, 1944, because he gave testimony under the Act in connection with proceedings had before the National Labor Relations Board in the matter of Kinner Motors, Inc. and International Association of Machinists, Lodge No. 94, for and on behalf of Lodge No. 311, AFL, known as Case No. 21-C-2307, and Respondent has failed and refused to reinstate the said James M. Davis and has continued in its failure and refusal since the date of said discharge; that by these acts and each of them as herein set forth, Respondent did discriminate against the said James M. Davis, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (4) of the Act.

VI.

Respondent, by its acts and each of them as set forth in paragraphs IV and V above, did interfere with, restrain and coerce, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

VII.

The aforesaid acts of Respondent, as set forth and described in paragraphs IV, V, and VI above,

constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (1), (3), and (4) and Section 2, subsections (6) and (7) of the Act.

VIII.

The aforesaid acts of Respondent as set forth in paragraphs IV, V, and VI above, occurring in connection with the operations of Respondent as described in paragraphs I and II above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states of the United States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Wherefore, the National Labor Relations Board on the 11th day of May, 1944, issues its Complaint against Kinner Motors, Inc., Respondent herein.

[Seal]

ELWYN J. EAGEN

Elwyn J. Eagen,

Regional Director National Labor Relations Board,
Twenty-first Region, 111 West Seventh Street,
Los Angeles, California.

BOARD'S EXHIBIT NO. 1-C

United States of America
Before the National Labor Relations Board
Twenty-first Region
Case No. 21-C-2389

In the Matter of—

KINNER MOTORS, INC.

and

INTERNATIONAL ASSOCIATION OF MA-
CHINISTS, AFL

NOTICE OF HEARING

Please Take Notice that on the 29th day of May, 1944, at 10:00 A.M. on the Ninth Floor, Board of Trade Building, 111 West Seventh Street, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the Regional Director for the 21st Region, with offices at 111 West Seventh Street, Los Angeles, California, acting in this matter as agent of the National Labor Relations Board, an answer to the said Complaint, within ten (10) days from the service thereof.

Please Take Notice that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

In Witness Whereof the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Regional Director for the Twenty-first Region on this 11th day of May, 1944.

[Seal]

ELWYN J. EAGEN

Elwyn J. Eagen,

Regional Director National
Labor Relations Board.

BOARD'S EXHIBIT NO. 1-H

United States of America

Before the National Labor Relations Board

Twenty-first Region

Case No. 21-C-2389

In the Matter of

KINNER MOTORS, INC.

and

INTERNATIONAL ASSOCIATION OF MA-
CHINISTS, AFL

ANSWER OF KINNER MOTORS, INC.

Comes Now, Kinner Motors, Inc., in answer to

the charge of the International Association of Machinists, AFL and to the complaint of the National Labor Relations Board and denies and alleges as follows:

I.

Denies generally and specifically all of the allegations contained in the charge of the International Association of Machinists, AFL filed March 2, 1944.

Answering the Complaint on file Respondent denies and alleges as follows:

I.

Admits all of the allegations of Paragraph I.

II.

Admits all of the allegations of Paragraph II.

III.

Admits all of the allegations of Paragraph III.

IV.

Answering the allegations of Paragraph IV this Respondent denies that it discharged the persons named therein because of their membership in and/or activity on behalf of the Union.

This Respondent further denies that by its acts as alleged in the complaint, or otherwise or at all, it did discriminate in regard to hire and/or tenure of employment of the aforesaid employees, and denies that it did discourage and/or is discouraging membership in the Union, and denies that it has engaged in and/or is engaging in unfair labor

practices within the meaning of Sec 8, subsection (3) of the Act, or otherwise or at all.

V.

Answering Paragraph V this Respondent denies that it discharged the said James M. Davis on or about February 24, 1944, because he gave testimony under the Act in connection with proceedings had before the National Labor Relations Board, In the Matter of Kinner Motors, Inc., and International Association of Machinists, Lodge No. 94, for and on behalf of Lodge No. 311, AFL, known as Case No. 21-C-2307.

Respondent further denies that by these acts or any acts, Respondent did discriminate against said James M. Davis and/or did thereby engage in and/or is thereby engaging in, unfair labor practices within the meaning of Sec. 8, subsection (4) of the Act.

VI.

Answering Paragraph VI this Respondent denies that by its acts and each of them, as set forth in Paragraphs IV and V of the complaint or otherwise or at all, it did interfere with, restrain and/or coerce and/or is interfering with, restraining and/or coercing its employees in the exercise of the rights guaranteed in Sec. 7 of the Act, and denies that it did thereby or at all, engage in and is hereby engaging in, unfair labor practices within the meaning of Sec. 8, subsection (1) of the Act or otherwise or at all.

VII.

Answering Paragraph VII denies that the acts of Respondent as alleged in Paragraph IV, V and/or VI above, or any acts of this Respondent, constitute unfair labor practices, affecting commerce, within the meaning of Sec. 8, subsections (1), (3) and (4), and Sec. 2, subsections (6) and (7) of the Act.

VIII.

This Respondent denies that the acts of Respondent as set forth in Paragraphs IV, V and VI above, or any acts of the Respondent, occurring in connection with the operations of the Respondent as described in Paragraphs I and II above, have a close, intimate and/or substantial relation to trade, traffic and/or commerce among the several states of the United States, and denies that said acts or any acts of Respondent, tend to lead to labor disputes, burdening and obstructing commerce and/or the free flow of commerce.

Wherefore, Respondent prays that said complaint be dismissed.

VICTOR FRED COLLINS

Attorney for Respondent

State of California,
County of Los Angeles—ss.

Victor Semrau, being by me first duly sworn, deposes and says: that he is the Secretary of Kinner Motors, Inc., a corporation, Respondent in the above entitled action; that he has read the foregoing Answer of Kinner Motors, Inc., and knows

the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

VICTOR E. SEMRAU

Subscribed and sworn to before me this 13th day of May, 1944.

[Seal] ELIZABETH L. KULINS

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Feb. 14, 1946.

United States of America

Before the National Labor Relations Board

Case No. 21-C-2389

In the Matter of

KINNER MOTORS, INC.

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS, A.F.L.,

DECISION AND ORDER

On August 5, 1944, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom

and take certain affirmative action, as set forth in the copy of the Intermediate Report annexed hereto. Thereafter, the respondent filed exceptions to the Intermediate Report and a brief to support the exceptions. The Machinists has filed no exceptions or brief.

Pursuant to notice and at the request of the respondent, a hearing for the purpose of oral argument was held before the Board on November 30, 1944, at Washington, D. C. The respondent appeared by counsel and participated in the argument. The Machinists did not appear. The Board has considered the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Board has considered the Intermediate Report, the respondent's exceptions and briefs including a brief submitted to the Trial Examiner, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the modifications noted hereinafter.

At the oral argument before the Board, the respondent argued, among other things, that even if the respondent discriminatorily discharged Swope, Davis, and Gilpin, as the Trial Examiner found, the respondent was justified in denying reinstatement to them upon learning, subsequent to their discharge, of the derogatory statements made by them concerning the value of United States War Bonds, as more fully set forth in the Intermediate

Report, and that the Board, as a matter of policy, should withhold its normal remedy of reinstatement here because reinstatement of such employees would adversely affect morale among the respondent's remaining employees. Like the Trial Examiner, we do not condone the making of statements such as those made by the three employees involved herein, particularly in view of the fact that war workers are being urged to exert their utmost to speed production vital to the prosecution of the war. However, like the Trial Examiner, and for the reasons set forth in the Intermediate Report, we believe that, in failing or refusing to reinstate Swope, Davis, and Gilpin, the respondent was motivated by their union activities rather than by the fact that they had made the derogatory statements concerning war bonds. We are also of the opinion that under the circumstances disclosed here, reinstatement of the three discriminatorily discharged employees, in itself, would not adversely affect plant morale or production, and that effectuation of the purposes and policies of the Act requires their reinstatement with back pay. Nevertheless, nothing in our Decision and Order should be construed to preclude the respondent from resorting to nondiscriminatory disciplinary action appropriate to bar the resumption of such practice in the event that the three employees, or any of them, make any such derogatory statement with respect to United States War Bonds in the future.

In the intermediate Report the Trial Examiner rejected the respondent's contention that the three

employees should be denied reinstatement because they did not exhaust their remedies under the grievance procedure established pursuant to the respondent's contract with the Association. We agree with the Trial Examiner that such contention is without merit in view of the Board's previous determination that the Association is a company-dominated organization within the meaning of Section 8 (2) of the Act.¹ In addition, even if the Association were free of such taint, the contention is without merit in view of the express provisions contained in Section 10 (a) of the Act.²

ORDER

Upon the entire record in the case, and pursuant to Section 10 (a) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Kinner Motors, Inc., Glendale, California, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in International

¹Matter of Kinner Motors, Inc., 57 N.L.R.B. 622.

²Sec. 10 (a) provides: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." See, for example *N.L.R.B. v. Newark Morning Ledger Co.*, 120 F. (2d) 262, 267-268 (C.C.A. 3).

Association of Machinists, affiliated with the American Federation of Labor, or in any other labor organization of its employees, by discriminating in regard to the hire or tenure of employment of any of its employees, or any term or condition of employment;

(b) Discharging or otherwise discriminating against any employee because he has given testimony under the Act;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, affiliated with the American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Richard Arthur Swope, Lewis Gilpin, and James Macon Davis immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges;

(b) Make whole Richard Arthur Swope, Lewis Gilpin, and James Macon Davis for any loss of pay they may have suffered by reason of the respondent's discrimination against them, by payment to

each of them of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during said period;

(c) Post immediately in conspicuous places in each of its Glendale, California, plants, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a), (b), and (c) of this Order; (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) of this Order; and (3) that the respondent's employees are free to become or remain members of International Association of Machinists, affiliated with the American Federation of Labor, and that the respondent will not discriminate against any employee because of membership in or activity on behalf of that organization;

(d) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 13 day of
December 1944.

HARRY A. MILLIS

Chairman.

GERARD D. REILLY

Member.

JOHN M. HOUSTON

Member.

[Seal]

NATIONAL LABOR RELA-
TIONS BOARD

[Title of Board and Cause.]

Mr. William B. Esterman, for the Board.

Mr. Victor Ford Collins, and Mr. Arnold M.
Cannan, of Los Angeles, Calif., for the respondent.

Mr. A. C. McGraw, of Burbank, Calif., for the
Machinists.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon a charge duly filed on March 2, 1944, by
International Association of Machinists, affiliated
with the American Federation of Labor, herein
called the Machinists, the National Labor Relations
Board, herein called the Board, by its Regional
Director for the Twenty-first Region (Los Angeles,
California), issued its complaint dated May 11,
1944, against Kinner Motors, Inc., Glendale, Cali-
fornia, herein called the respondent, alleging that
the respondent had engaged in and was engaging in

unfair labor practices affecting commerce within the meaning of Section 8 (1), (3) and (4) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, with notice of hearing thereon, were duly served upon the respondent and the Machinists.

With respect to the unfair labor practices, the complaint alleged in substance that the respondent discharged Richard Arthur Swope, James Macon Davis, and Lewis Gilpin, its employees, because of their affiliation with and activity on behalf of the Machinists. The complaint further alleged that the respondent discharged James M. Davis because he gave testimony for and on behalf of the Machinists in a prior Board proceeding in which the respondent was charged with unfair labor practices.¹ Because of the foregoing conduct, the complaint alleged that the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

In its duly filed answer to the Board's complaint, the respondent denied that it had engaged in any of the alleged unfair labor practices.

Pursuant to notice, a hearing was held on June 6, 7, 8, 9, and 12, 1944, at Los Angeles, California, before the undersigned, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the Machinists by a lay representative.

¹Matter of Kinner Motors, Inc. and International Association of Machinists, Case No. 21-C-2307.

All parties participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the close of the Board's case the respondent moved to dismiss the complaint insofar as it alleged the discriminatory discharge of the three named employees. The undersigned denied this motion. Near the close of the hearing, counsel for the Board moved to conform the pleadings to the proof as to minor particulars such as the spelling of names. The undersigned granted this motion. Oral argument, in which counsel for the Board and for the respondent participated, was heard at the conclusion of the taking of evidence. The parties were advised that they might file briefs with the undersigned. Pursuant thereto the respondent filed a brief.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes, in addition to the above, the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Kinner Motors, Inc., a California corporation, owns and operates two plants at Glendale, California, herein called Plant 1 and Plant 2, respectively, where it is engaged in the manufacture of aircraft engine parts and the assembly of aircraft engines. During the calendar year 1943, the respondent in the course and conduct of its business, purchased

raw materials valued at more than \$7,000,000, of which materials valued at more than \$3,000,000 were transported to the respondent's plants from points outside California. During the same period respondent sold and distributed finished products valued at more than \$3,000,000, of which amount finished products valued at more than \$500,000 were made for delivery, and were delivered, by the respondent to points and persons outside the State of California.

The respondent concedes that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

International Association of Machinists, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. Discrimination, interference, restraint and coercion

It is alleged that the respondent discriminatorily discharged Richard Arthur Swope, Lewis Gilpin, and James Macon Davis. The named employees were, at the time of their respective alleged discharges, employed by the respondent in its tool room at Plant 1, on the night or "swing" shift, and during the period involved were the sole employees in this department on the night shift of Plant 1. The tool room is on the same floor as, and adjacent

to, respondent's machine shop. The function of the tool room is to make, repair and maintain tools of various kinds that are required for the operation of machines in the production or manufacture of parts for the finished product. It is seen therefore that the work of the tool room and the machine shop is closely related. During the period herein involved, Ross Nichols was in charge of the tool room, and Foreman Brian Johnson was in charge of the machine shop at Plant 1. Clifton Malamphey, Jr., a toolmaker, was Nichols' assistant, and was in charge of the tool room during Nichols' absence.

Swope, an experienced mechanic, was employed by the respondent in June, 1940, and worked continuously thereafter for the respondent until February 17, 1944, when he was laid off or discharged. From a starting wage of 50 cents an hour, he received periodic increases and was, at the time his employment was terminated, paid 95 cents an hour plus a 5 cents an hour bonus allowed for work on a night shift. He was first employed on various machine operations in the machine shop, and in August 1943, was transferred to the tool room, after he had protested his rate of pay and had requested a certificate of availability which would enable him to seek employment elsewhere. At the time of the transfer, Swope's pay-roll classification was changed from "radial drill press operator" to "tool maker, Class C."² This change admittedly represented a promo-

²Tool makers are classified as A, B, and C, in descending order of skill and wage.

tion. He continued as a tool maker until the termination of his employment.

Davis, an experienced machinist, was employed by the respondent in October 1941, and worked continuously thereafter until February 23, 1944, when he was discharged or laid off. He was first employed in the sub-assembly of aircraft engines, and was later transferred to the machine shop on the second or "swing" shift. Effective March 3, 1943, Davis was classified as a Class C tool maker, at \$1.05 an hour. On March 16, 1943, he received a merit increase of 5 cents an hour. Effective July 16, 1943, he was reclassified as tool maker, Class B, at \$1.15. Effective December 1, 1943, Davis received a "merit increase for superior quality work," raising his basic wage from \$1.15 to \$1.20 an hour.

Gilpin, a machinist of many years' experience and with some 12 years of experience as a tool maker, was employed by the respondent as a machinist in December 1942, at \$1.25 an hour. After about one month in the machine shop, he was transferred to the toolroom, and worked continuously thereafter as a tool maker in Plant 1, night shift, until February 23, 1944, when he was laid off or discharged. Prior to July 16, 1943, he was classified as a Class B machinist; on August 16 of that year he was reclassified as a Class A machinist. As of the date his employment terminated, he was paid \$1.30 an hour plus a 5 cent bonus.

It is seen from the foregoing, that at the time of the termination of their employment, Swope, Davis and Gilpin were experienced tool makers, a

job classification requiring the highest degree of skill, and were also qualified as machine operators and all around machinists,³ having been engaged on numerous machine operations in their employment with the respondent, as well as previous thereto. It further appears that the work of the named employees was satisfactory throughout their tenure of employment. This is shown by their record of advancement in job classification and numerous wage increases. There are additional circumstances to support the conclusion. Early in December 1943, Davis approached Edward Davey, works manager in charge of production at Plant 1, and asked for a wage increase or a certificate of availability. Davey replied that he would see that Davis was "taken care of," and commented that the latter's work had been very satisfactory and that he had cited Davis to other employees to show the advancement that could be obtained through meritorious work. Davey also remarked, "Your friend Gilpin is the best man I have got in the toolroom . . . I don't know what I would do without him."⁴ On another occasion, in 1943, Brian Johnson remarked that Swope had broken a production record on a radial drill press operation. Respondent's position that the sole rea-

³"Machinist" represents a higher classification of skill than "machine operator," since the former is experienced in the operation of various machines whereas the latter may be required to operate only one type of machine.

⁴This finding is based on the uncontradicted and credited testimony of Davis.

son for the termination of their employment was lack of work, in effect, concedes that Swope, Davis, and Gilpin were satisfactory in the discharge of their respective duties.

Beginning December 13, 1943, a hearing was held pursuant to the Board's complaint which alleged that the respondent had dominated and rendered illegal assistance to the formation and administration of Kinner Motor Employees' Association, Inc., herein called the Association.⁵ The Board's complaint was based on a charge filed by the Machinists. In this hearing, Davis testified as a Board witness and gave testimony adverse to the respondent and, in particular, contradicted the testimony of Brian Johnson, a witness for the respondent. While neither Swope nor Gilpin testified in the hearing, they attended it and, on occasion, sat with Davis. It is clear that their presence at the hearing was known to management. Subsequent to the hearing, when asked by employee Edward Handzel how the hearing came out, Foreman Johnson remarked, "these damn fools over in the toolroom are just a bunch of trouble makers," and further said that he did not see why if they did not want to belong to the Association, they had to take the matter to the Board.⁶

⁵See footnote 1, *supra*.

⁶This finding is based on Handzel's credited testimony. Johnson denied that he made the statements attributed to him by Handzel or that he had a conversation with Handzel. In view of the entire testimony the undersigned is unable to credit his denial.

Subsequent to the Board hearing, Swope, Davis, and Gilpin participated actively in the Machinists' organizational drive. They each signed authorization cards, and wore Machinists' buttons while at work in respondent's plant, and Davis was designated Machinists' steward on his shift at Plant 1 and for some 10 days prior to his discharge or lay-off wore a steward button. Because of their close association, the three employees were sometimes referred to by other employees as "The Three Musketeers."

On January 25, 1944, the Board's Trial Examiner in Case No. 21-C-12307, issued his Intermediate Report in which he based certain findings adverse to the respondent on the testimony of Davis and discredited conflicting testimony of Foreman Johnson.⁷ On February 9, the Machinists distributed several hundred circulars outside respondent's plant advertising a union meeting. On February 17, when Swope reported for work, Ross Nichols, foreman in charge of the toolroom, advised him, without prior notice, that there was no further work for him. When Swope asked why he had not been given advance notice of the lay-off, Nichols replied, "Things are changing rapidly and one never knows what happens from one day to the next."⁸ Swope

⁷The Trial Examiner's findings were subsequently confirmed by the Board. See: 57 N.L.R.B. No. 103.

⁸This finding is based on Swope's credited testimony. Nichols gave a somewhat different version of the conversation but was, on the whole, a less credible witness than Swope. The undersigned, however,

returned several days later and was given his pay check and a termination slip which stated: "Laid off—Termination of Contract."

On February 23, when Gilpin and Davis reported for work at their usual hour they found that their work cards were missing and were advised by a plant guard that they were wanted at the personnel office. At the personnel office, a Miss Gremmels advised them, "You are terminated. Didn't you know it?" and reading from their termination slips, commented, "This says 'lay-off, lack of work.'" Personnel Director Emmett J. Sullivan, called from an inside office, said "Boys, I don't know a thing about this . . . Nick (Nichols) just called me and said there wasn't any work for you." Davis and Gilpin were then escorted inside the plant by an armed guard where they received their tool clearance slips. They returned for their checks on the following day and received their termination notices which stated: "lay-off; lack of work. No available work for this employee."

As previously noted, it is respondent's position that Swope, Davis and Gilpin were temporarily laid off because of lack of work. It appears that on December 29, 1943, contracts in an amount of \$1,500,00 involving production at Plant 1 were cancelled, leaving a balance of \$400,000 in contracts for that plant, and no new contracts for that plant were obtained until subsequent to February 23, 1944.

credits respondent's witnesses that it does not customarily give advance notice of discharge or lay-off.

It further appears that no toolmakers have been employed in the tool room at Plant 1, on a night shift, since the named employees were discharged or laid off. The tool room of the same plant on the day shift has functioned continuously to the present, but without increased personnel. There has also been a gradual reduction in personnel of the entire night shift at Plant 1 over a period of a year or more. The foregoing, however, presents only a partial picture of respondent's total operations.

In addition to Plant 1, respondent has had in continuous operation for the past year, Plant 2. The two plants are physically separated by a narrow alley and insofar as machine operations and tool making are involved, are engaged in production of the same general character, so that the transfer of personnel from one plant to the other is not only feasible but is a matter of common practice as shown by the entire record. Five of the total of 19 employees on the night shift of Plant 1 as of August 1, 1943, were thereafter transferred to jobs in Plant 2. Whereas the total employment at Plant 1 has been maintained at a fairly stable level, Plant 2 has had an increased personnel, exclusive of office help, of from 164 on July 31, 1943, to 450 on April 30, 1944. The cancellation of contracts involving Plant 1, as alleged by respondent in support of its position, appears actually to have had little effect on total employment, since respondent's own records show that a total of only 19 employees of Plant 1 were laid off on asserted grounds of lack of work or reduction in personnel due to cancellation of

contracts. Of these, 16 were engaged in motor mount installations in the field, and their employment was terminated when the installations were completed. It appears therefore that only Swope, Davis and Gilpin of all these employed on regular and continuous operations in Plant 1, had their employment terminated during this period for the alleged reason of lack of work.

Not only did the cancellation of contracts affecting Plant 1, not necessitate or cause a general reduction in personnel, but, to the contrary, respondent substantially increased its total personnel in the period immediately following the cancellations, and throughout the period prior to and subsequent to the lay-off or discharge of Swope, Davis and Gilpin, solicited applicants for jobs which these employees were qualified to fill, through advertisements inserted in various newspapers. During the period of January 1, 1944 to April 20, 1944, respondent hired a total of 137 employees for production or tool department jobs, at a wage rate of 85 cents an hour or more. Of these all were employed at Plant 2, except five who were employed at Plant 1, and seven were rehired after a leave of absence.

Swope, Davis and Gilpin testified that there was no slackening of work in the tool room at any time prior to their respective lay-offs or discharges. On January 1, 1944, subsequent to the cancellation of contracts, the respondent requested occupational draft deferment for Davis on the ground that he was engaged in a highly skilled operation, that it

would take six months to replace him, and that he could be replaced only out of industry. There is no plausible explanation for this request if respondent anticipated a slackening of work following cancellation of contracts which would require it to terminate Davis' employment. Assuming, however, that respondent closed its tool room on the night shift of Plant 1 because it was no longer essential to production, it would appear that as a matter of normal business practices, in view of the admitted difficulty in recruiting highly skilled employees under war conditions, respondent would not have terminated the employment of Swope, Davis and Gilpin without some effort to utilize their skills in the operation of its two plants. However, Nichols, who caused the termination of their employment, and Davey, with whom he consulted in the matter, both admitted that they gave no attention to the matter of utilizing the skills of these employees in other departments. That there was work available for them is clearly indicated.

On February 17, the date that Swope was discharged, respondent hired a toolmaker at Plant 2. On February 21, 25, 27 and 28 it hired employees in the following job classifications: milling machine operator, radial drill operator, grinder, surface grinder, and engine lathe operator, at wages ranging from 95 cents to \$1.20 an hour.

Swope, Davis and Gilpin were each qualified and experienced in these operations. Subsequently, respondent hired numerous other employees in ma-

chinist, machine operator, and other equivalent job classifications which the three named employees were qualified to fill. An incident which involved the hiring of Lee Munkachy casts further doubt on the validity of respondent's contention that Davis and Gilpin were laid off because of lack of work.

On February 23, the day on which Davis and Gilpin were laid off, Munkachy applied for tool and die work and was advised by Personnel Director Emmet J. Sullivan⁹ that there was no opening. On returning home that night he found a letter from Sullivan, dated February 23, which bore the following text:

We regret that in error you were told that we could not use you. We can start you in the tool room Monday night at \$1.05 per hour.

Please report at 4 p.m. Monday at the personnel office ready to start to work.

Munkachy saw Sullivan on Monday, February 28, and was advised by the latter that he would be hired as a toolmaker at Plant 1. When he reported for work the next day, however, he was asked to take a temporary job in Plant 2. It was his uncontradicted and credited testimony that he accepted the work with the understanding that he would be transferred to toolmaker work in Plant 1. Finding his work unsatisfactory in Plant 2, Munkachy asked for a release and was told by Howard Sharrar,

⁹At the time of the hearing Sullivan's title was Director of Industrial Relations, but throughout the period involved herein he was respondent's personnel director.

night superintendent at Plant 2, that within two weeks he would be transferred to Plant 1. Sharrar took Munkachy into Plant 1, showed him the tool room there, and advised him that he would work under Nichols. Later, Sharrar told Munkachy to "keep it under" his "hat" about the transfer and not to talk to other employees about it, since things were not yet ready for the transfer.

Sullivan testified with reference to the February 23 letter, that at the time he wrote the letter he did not know that Davis and Gilpin were being laid off. He also testified that the respondent did not keep in touch with laid off employees with reference to future employment. Admittedly, however, he saw Davis and Gilpin in the personnel office after 5 p.m. o'clock on February 23, at which time it is reasonably assumed, on the basis of his letter to Munkachy, he had received a requisition to hire a toolmaker. In any event, Davis and Gilpin had further contact with the personnel office on February 24, when they returned to get their final checks, at which time the personnel office indubitably had knowledge of the requisition. It further appears from Sullivan's testimony that requisitions for hiring came to him from the plant or department head. Therefore, it must be assumed that a requisition for the hiring of a toolmaker at Plant 1 had been issued by either Davey or Nichols as of the date Davis and Gilpin were laid off allegedly for lack of work. That Munkachy was not actually assigned to work in the tool room of Plant 1 but was advised that he would shortly be transferred

to that department and cautioned not to tell his fellow employees of the promised transfer, is strongly indicative, in the absence of any explanation whatever, of a deliberate effort to conceal the actual circumstances of his hiring.

In view of the actual hiring of numerous new employees of Plant 2 subsequent to and contemporaneous with the discharge of Swope, Davis and Gilpin, in positions which these employees were qualified to fill, the transfer of certain other employees from Plant 1 to Plant 2, and the equivocal circumstances of the hiring of a toolmaker on the date that Davis and Gilpin were discharged, as set forth above, the undersigned is unable to credit respondent's position that the employment of Swope, Davis and Gilpin was terminated because of lack of work.

Respondent's interference with the organizational activities of its employees, is established in the Board's finding that the respondent, shortly after the Machinists began an organizational drive among its employees, fostered and rendered illegal support to the Association.¹⁰ Personnel Director Sullivan and Foreman Brian Johnson participated in this illegal activity. Mention has been made of Davis having testified in the prior Board proceeding adversely to the respondent. It was not, however, until subsequent to the hearing and in the period immediately preceding their respective discharges, that Swope, Davis and Gilpin wore their Machinists buttons and that Davis was made steward on his

¹⁰See: 57 N.L.R.B. No. 103.

shift. The Machinist's leaflet distributed out the plant on February 9, is indicative of continuing organizational activity. Nichols, however, who, with Davey's approval, terminated the employment of the three named employees, denied that he knew that Davis testified in the Board hearing, that he discussed the hearing with representatives of management, that he had any knowledge that the Machinists were engaged in organizing respondent's employees other than what he gained from a newspaper report, or that he had ever seen Machinists buttons worn in the plant, although admittedly a number of employees wore such buttons. In view of the total circumstances, Nichols' denials are not credible and reflect an intent to conceal the actual motivation of the discharges.

On the basis of the foregoing findings of fact and the entire record, the undersigned finds that the respondent discharged Swope, Davis and Gilpin because of their union affiliation and activities, and, with especial reference to Davis, because of the latter's having testified in a prior Board hearing. By the aforesaid action, the respondent discouraged membership in the Machinists and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

It is the respondent's further contention that, assuming arguendo it laid off or discharged Swope, Davis and Gilpin because of their union activity, certain statements and conduct occurring while they were still employees of the respondent but which came to the knowledge of respondent subse-

quent to February 23, constitute cause for a refusal of reinstatement and should, as a matter of Board policy, bar their reinstatement.¹¹ In support of this position, respondent adduced testimony showing that each of the discharged employees made statements adverse to the purchase and sale of war bonds. Leslie Dayhoff, a Board witness, and Frank Holmes, John Shelley, Glenn Gilmore, John Szabo, Clifton Malamphey, Vera Allan, and Theodore Gerth, respondent witnesses, testified concerning the alleged statements, which appear to have occurred during the several war loan drives conducted by the U. S. Treasury Department.¹² The testimony of

¹¹The respondent also asserted as a bar to the reinstatement of the discharged employees, that they had failed to avail themselves of grievance procedure which the respondent alleged was provided in its contract with the Association. The Board having found that the Association was company dominated, it is obvious that the employees were not required to pursue a grievance procedure of a contract which was invalid from its inception.

¹²Dayhoff testified that Swope and Davis said that it was foolish to spend money for war bonds, that they would not "materialize," and that nobody would get their money back from them. He further testified "We had had arguments off and on about it." He admitted that he told Foreman Johnson that he did not believe in the sale of war bonds himself. Shelley testified that on an occasion when he had bought a bond, Gilpin remarked, "I guess we can paper the house with them when the war is over," and that on another occasion, Davis remarked that the bonds would not be worth a "darn" after the war. Gilmore testified that in the Fall of 1943, he heard both Gilpin and Davis say that the

these witnesses, collectively, is to the effect that on numerous occasions Davis and Gilpin, and much less frequently, Swope, expressed an opinion that war bonds would be worth little or nothing after

bonds would be no good after the war. He further testified that after the second bond drive, Gilpin offered to sell him a bond for \$10 and remarked, "If I buy them, I sell them, anyway." Malamphey, a tool maker and assistant to supervisor Nichols, testified that he had heard Davis and Gilpin say that the bonds would be no good after the war and they "were also selling them as soon as possible." According to Malamphey, Gilpin said that the Government would not have enough money to pay off the war bonds after the war because of a different "system." Apparently this was a reference to some doctrine of technocracy which appears to have furnished the basis for the statements that the bonds would have little monetary value after the war. Szabo testified that when he told Gilpin that he had bought about \$1500 worth of bonds, Gilpin said, "Well, they won't be worth a nickel after the war. They won't be no account." He also testified that in January, 1944, when Swope was solicited to purchase a bond, Swope replied, "I wouldn't give you a nickel for any War bond." Vera Allen testified that Davis came to her machine and "made the statement that the bonds would not be worth a nickel after the war." Gerth testified that he had heard Swope, Davis and Gilpin each say that the bonds would be no good after the war. The aforesaid witnesses were generally unable to give a detailed account of the conversations in which the aforesaid statements occurred.

Szabo who manifested an antagonism toward the discharged employees, admitted that he was opposed to labor unions. Allen was identified with the company-dominated Association and in a written statement given to Foreman Johnson on February 28,

the war. None of the aforesaid witnesses reported or complained to management concerning the aforesaid statements, prior to the discharge of the three employees, except Frank Holmes. Holmes testified that when he received his first bond, he told

stated that Swope, Davis and Gilpin had refused to buy bonds during the fourth war loan drive, but made no mention of Davis having made the statement mentioned in her testimony. Malamphey as assistant to Foreman Nichols, was identified with management, and after the Board hearing of December 1943, in which Davis testified as a Board witness, told Davis and Gilpin, "You guys didn't have any business bringing my name up down at the hearing." On another occasion, observing that Davis wore a Machinists' badge, Malamphey reminded him that he had previously said that he was against unions, and remarked, "I don't think much of a fellow that will say one thing and do another." Gerth, when Davis said that he believed that the employees might be represented by the Machinists "before long," replied: "I don't agree with you, . . . Knowing the company executives as I do, they will close the plant before they will allow any such union in this building." With due consideration of such bias as is reflected by the foregoing, the undersigned is convinced upon the basis of the entire testimony that Swope, Davis and Gilpin made statements relative to the sale and purchase of war bonds substantially as set forth in the preceding paragraph. The undersigned does not credit Szabo's testimony to the effect that Gilpin remarked on one occasion that the Red Cross profited from the sale of blood donations. There was no corroboration of this testimony and Gilpin denied that he made the statement. It was his undisputed and credited testimony that he donated blood on one occasion and was advised by his physician against further blood donation.

Davis and Gilpin that he had bought a \$50 bond, and they replied that the bonds would not be worth \$5 after the war. On that same day, Holmes told Foreman Brian Johnson of the statements. Johnson testified that he advised Holmes on that occasion, "Frank, don't take that seriously. They are just kidding you. You are just an old man and they are kidding you." Johnson did not consider, at that time—which according to him was the Fall of 1943—that the matter was serious enough to bring to the attention of management.

Gilpin admitted that he had stated that it was not patriotic to buy war bonds at a profit. "I would say that here or anywhere," he testified, "that I thought anybody that would buy war bonds for a profit while the boys are dying in France, wasn't very patriotic. I say give the money; they were giving their lives." He denied, however, that he stated that the bonds would be worthless. Davis admitted that he told Dayhoff on one occasion that he did not believe in "tying up all the money that a man had in War Bonds, because they might be frozen at any time and he wouldn't have the opportunity to get necessary money in case of sickness or so forth." He did not recall having said at any time that the bonds would be worthless. "I said," he testified, "that it was possible that the Government debt would get so big they couldn't pay off. I didn't say they would. I said it was possible." He also admitted that he told Dayhoff that he did not know that the bonds would be good

“since the war bonds in the first war were not redeemed at full price and this was a much bigger debt at this time than it was before.” Swope testified that after reading a newspaper article in January 1944, on the amount of money spent by the U. S. Treasury in advertising the sale of war bonds, he remarked to Dayhoff that it might be more practical to spend the money on the purchase of war materials instead of advertising. He did not recall ever having stated that the bonds would be worthless. Swope, Davis and Gilpin each participated in pay-roll deductions for the purchase of war bonds. Swope when first presented by Foreman Johnson with a form authorizing pay-roll deduction for the purchase of bonds, advised Johnson that he would take all he could, and later authorized an increase in his pay-roll deductions.

Upon the basis of the entire testimony, the undersigned is convinced that Swope, Davis and Gilpin each made statements to fellow employees, which would be understood by the employees addressed as adverse to the purchase of war bonds. The undersigned believes, however, that these statements were generally made in a context of casual discussion and arguments among employees,¹³ and that

¹³Shelley having testified that Davis told him the bonds would not be worth a “darn” after the war, on being questioned by Board’s counsel, “What did the other people say about it, if they said anything?” answered, “Just a matter of laughter, and that is all . . .” He also testified, “I said myself I didn’t think they would be any good.” According

while, in the opinion of the undersigned, certain of the statements were ill-advised and improper, they did not represent a wilful and malicious obstruction of the war effort, and are not distinguishable in principal from such criticism of certain phases of the war effort as is heard in and out of industry, and which is privileged under our constitutional guarantee of free speech. Throughout the period when these statements were made, Swope, Davis, and Gilpin were actually cooperating in the purchase of war bonds through pay roll deductions, and there is no evidence that their talk provided an actual impediment to the sale of war bonds¹⁴ or created disorder or commotion in the plant, or in any way interfered with respondent's production or discipline.¹⁵ Had it done so, it assuredly would have reached the ears of management, and yet Ross Nichols, immediate supervisor of the discharged

to Shelley, who worked on a day shift, "Anything the night shift does, the day shift jumps on them. Anything the day shift does, the night shift jumps on them. Any argument, it is always pro and con; it has always been that way."

¹⁴Sullivan testified: "For the Fourth War Bond we were awarded the Treasury Department Minute Man flag with the T and the star."

¹⁵Respondent's contention that reinstatement of the discharged employees would be disastrous to employee morale, appears groundless since there is no evidence that during a period extending from the summer of 1943 to February 1944, the morale of respondent's employees was adversely affected by the statements relative to the purchase and sale of war bonds.

employees, admitted that he never heard, and respondent admitted that it had no knowledge of, the statements prior to the date when the employment of Swope, Davis and Gilpin was terminated.

Sullivan testified that he first learned of the bond statements on February 28, from Foreman Brian Johnson who volunteered the information, and that he instructed Johnson to obtain proof of the statements in writing. Pursuant to these instructions, Johnson approached the employees during their working hours and asked them, "Do you want to make a statement in regard to the talk these boys have been passing around about the war bonds?" It appears that only Gerth, Allen and Szabo, of the employees thus approached, were willing to give written statements. Johnson testified that he told Sullivan that the employees were "incensed" over the bond talk and he thought something could be done to "restrain those boys," and that getting the written statements was his idea. It is recalled, however, that in the interval since Holmes talked to Johnson about statements of Gilpin and Davis on war bonds, at which time Johnson did not consider the matter serious enough to call to the attention of management, Davis had testified in a Board hearing concerning Johnson's activity in assisting the formation of the Association, in contradiction of Johnson's testimony in the same proceeding. Johnson's report to Sullivan and activity in procuring written statements from employees, many of whom were under his supervision, during their working hours, is

properly evaluated in the light of these circumstances, and in the light of Johnson's admission that the men in the tool room were "disagreeable" to him.

On or about March 3, 1944, there was a hearing before the local committee or representatives of the War Manpower Commission, on the matter of the reinstatement of the discharged employees. The respondent neither then nor thereafter until the present hearing, asserted the statements on *on* war bonds as reason for its refusal to reinstate the discharges. The undersigned is convinced in the light of the entire circumstances,¹⁶ that the respondent's position relative to the war bond statements, represents an effort and intent to evade the consequences of its illegal act of discriminatory discharge, and that its actual motivation both in the discharge and in the refusal thereafter to reinstate, is properly found in the union affiliation and activities of the three employees. The question therefore becomes one of remedy and it is for the Board to determine whether as a matter of policy it should direct the reinstatement of Swope, Davis and Gilpin.

While in no sense condoning the statements of the discharged employees relative to the purchase

¹⁶The respondent asserted as further reason for its refusal to reinstate, that the employees engaged in cooking on company premises in violation of company rules, but abandoned this defense when its position was rendered untenable. See also footnote 11, *supra*.

and sale of war bonds, the undersigned believes that in the absence of an affirmative showing that the said statements resulted in an interruption of or interference with production and/or discipline, the Board should not depart from its normal practices as to remedy.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent as described in Section I above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the respondent has engaged in certain unfair labor practices, it will be recommended that the respondent cease and desist from such conduct and take certain affirmative action which the undersigned finds necessary to effectuate the policies of the Act.

The undersigned has found that the respondent discharged Richard Arthur Swope, Lewis Gilpin, and James Macon Davis because of their union affiliations and activities, and, with particular reference to James Macon Davis, because he gave testimony under the Act. The undersigned will recom-

mend that the respondent offer Swope, Gilpin, and Davis, immediate and full reinstatement to their former or substantially equivalent positions and make each of them whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his discriminatory discharge, to the date of the offer of reinstatement, less his net earnings¹⁷ during said period.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. International Association of Machinists, affiliated with the American Federation of Labor, is a labor organization within the meaning of Section 2 (5) of the Act.

¹⁷By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N.L.R.B. 440. Monies received for work performed upon Federal, State, county, municipal or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N.L.R.B.*, 311 U.S. 7.

2. By discriminating in regard to the hire and tenure of employment of Richard Arthur Swope, Lewis Gilpin, and James Macon Davis and thereby discouraging membership in a labor organization, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

3. By discriminating against James Macon Davis in regard to hire, tenure, and conditions of employment because he gave testimony under the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (4) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that the respondent, Kinner Motors, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, affiliated with the Ameri-

can Federation of Labor, by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of employment;

(b) Discharging or otherwise discriminating against any of its employees because he has given testimony under the Act;

(c) In any manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, affiliated with the American Federation of Labor, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

Offer to Richard Arthur Swope, Lewis Gilpin, and James Macon Davis immediate and full reinstatement to their former or substantially equivalent employment without prejudice to their seniority or other rights and privileges;

(b) Make whole Richard Arthur Swope, Lewis Gilpin, and James Macon Davis for any loss of pay they may have suffered by reason of the discrimination against them, by payment to each of them of a sum of money equal to that which he normally would have earned as wages from the date of his

discriminatory discharge, as found herein, to the date of the respondent's offer of reinstatement, less his net earnings¹⁸ during such period;

(c) Post immediately in conspicuous places in each of its Glendale, California plants, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraph 1 (a), (b), and (c) of these recommendations; (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) and (b) of these recommendations; and (3) that the respondent's employees are free to become or remain members of International Association of Machinists, affiliated with the American Federation of Labor, or any other labor organization of their choice, and that the respondent will not discriminate against any employee because of membership in or activities on behalf of International Association of Machinists, affiliated with the American Federation of Labor, or any other labor organization.

(d) File with the Regional Director for the Twenty-first Region, in writing within ten (10) days from the receipt of this Intermediate Report what steps the respondent has taken to comply therewith;

It is further recommended that unless on or before ten (10) days from the receipt of this Inter-

¹⁸See footnote 17, *supra*.

mediate Report the respondent notify said Regional Director in writing that it has complied with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board request therefor must be made in writing to the Board within ten (10) days from

the date of the order transferring the case of the Board.

WILLIAM E. SPENCER
Trial Examiner

Dated: August 5, 1944.

(Affidavit of Service by Mail attached.)

[Title of Board and Cause.]

STATEMENT OF EXCEPTIONS TO
INTERMEDIATE REPORT

Comes now Kinner Motors, Inc., and respectfully files this its Statement of Exceptions to Intermediate Report, dated August 5, 1944, and ordered transferred to the Board on August 8, 1944, and respectfully represents:

EXCEPTION No. 1

The evidence is insufficient to sustain the finding of the Intermediate Report (commencing Line 53, Page 2, to Line 2, Page 3), wherein it is found that the employee Swope was discharged.

EXCEPTION No. 2

The evidence is insufficient to sustain the finding (commencing Line 14, to Line 16, Page 3), reading as follows:

“Davis, an experienced machinist, was employed by the Respondent in October, 1941, and

worked continuously thereafter until February 23, 1944, when he was discharged."

EXCEPTION No. 3

The evidence is insufficient to sustain the finding (commencing Line 25 to Line 30, Page 3) wherein, among other things, it is found that the employee Gilpin was discharged.

EXCEPTION No. 4

The evidence is insufficient to sustain the finding (commencing Line 69, Page 5, to Line 3, Page 6) reading as follows:

"Assuming, however, that Respondent closed its tool room on the night shift of Plant 1 because it was no longer essential to production, it would appear that as a matter of normal business practices, in view of the admitted difficulty in recruiting highly skilled employees under war conditions, respondent would not have terminated the employment of Swope, Davis and Gilpin without some effort to utilize their skills in the operation of its two plants."

EXCEPTION No. 5

The evidence and the specific facts found are insufficient and do not justify the conclusion embraced in the last above-mentioned exception.

EXCEPTION No. 6

The evidence is insufficient to sustain the finding

(commencing on Line 9, Page 6) which reads as follows:

“On February 17, the date that Swope was discharged,” * * *

EXCEPTION No. 7

The evidence is insufficient to sustain the findings and the specific facts found do not justify the conclusions embraced in the Findings of Fact or Conclusions of Law embodied in the foregoing Exceptions.

EXCEPTION No. 8

The evidence is insufficient to sustain the finding (commencing on Line 14 to 21, Page 7) which reads as follows:

“In view of the actual hiring of numerous new employees at Plant 2 subsequent to and contemporary with the discharge of Swope, Davis and Gilpin, in positions which these employees were qualified to fill, the transfer of certain other employees from Plant 1 to Plant 2, and the equivocal circumstances of the hiring of a toolmaker on the date that Davis and Gilpin were discharged, as set forth above, the undersigned is unable to credit respondent's position that the employment of Swope, Davis and Gilpin was terminated because of lack of work.”

EXCEPTION No. 9

The evidence is insufficient to sustain the conclusion, and the specific facts found do not justify

the conclusion embraced in the exception last above referred to.

EXCEPTION No. 10

The evidence is insufficient to sustain the finding (commencing Line 45 to Line 52, Page 7) which reads as follows:

“On the basis of the foregoing findings of fact and the entire record, the undersigned finds that the respondent discharged Swope, Davis and Gilpin because of their union affiliation and activities, and, with special reference to Davis, because of the latter’s having testified in a prior Board hearing. By the aforesaid action, the respondent discouraged membership in the Machinists and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.”

EXCEPTION No. 11

That the evidence does not justify and the specific facts found do not justify and are inconsistent with the foregoing conclusions of law embraced in the last above referred to exception.

EXCEPTION No. 12

The evidence is insufficient to sustain the finding (commencing Line 4 to 6, Page 10) which reads as follows:

“The undersigned believes, however, that these statements were generally made in a context of casual discussion and argument among employees,” * * *

EXCEPTION No. 13

The evidence does not justify and the specific facts found do not justify the conclusion embraced in the last referred to exception.

EXCEPTION No. 14

The evidence is insufficient to justify the findings (commencing Line 13 to 16, Page 10) which reads as follows:

“and there is no evidence that their talk provided actual impediment to the sale of war bonds or created disorder or commotion in the plant, or in any way interfered with respondent's production or discipline.”

EXCEPTION No. 15

The evidence does not justify and the specific facts do not justify and are inconsistent with the conclusion embraced in the last referred to exception.

EXCEPTION No. 16

The evidence is insufficient to sustain the finding (commencing on Line 2 to 7, Page 11), which reads as follows:

“that the respondent's position relative to the war bond statements, represents an effort and intent to evade the consequences of its illegal act of discriminatory discharge, and that its actual motivation both in the discharge and in the refusal thereafter to reinstate, is properly

found in the union affiliation and activities of the three employees.”

EXCEPTION No. 17

The evidence does not justify and the specific facts found do not justify and are inconsistent with the conclusion embraced in the last above mentioned exception.

EXCEPTION No. 18

The evidence is insufficient to sustain the finding (commencing Line 12 to 16, Page 11), which reads as follows:

“While in no sense condoning the statements of the discharged employees relative to the purchase and sale of war bonds, the undersigned believes that in the absence of an affirmative showing that the said statements resulted in an interruption of or interference with production and/or discipline, the Board should not depart from the normal practices as to remedy.”

EXCEPTION No. 19

The evidence is insufficient to sustain the finding (commencing Line 35 to 46, Page 11), which reads as follows:

“The undersigned has found that the respondent discharged Richard Arthur Swope, Lewis Gilpin, and James Macon Davis because of their union affiliations and activities, and, with particular reference to James Macon Davis, because he gave testimony under the

Act. The undersigned will recommend that the respondent offer Swope, Gilpin and Davis, immediate and full reinstatement to their former or substantially equivalent positions and make each of them whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his discriminatory discharge, to the date of the offer of reinstatement, less his net earnings during said period."

EXCEPTION No. 20

The evidence is insufficient to justify and the specific facts found do not justify and are inconsistent with the conclusions embraced in the last above referred to exception.

EXCEPTION No. 21

The evidence does not justify and the specific facts found do not justify and are inconsistent with the conclusion of law (commencing Line 10 to Line 14, Page 12), which reads as follows:

"2. By discriminating in regard to the hire and tenure of employment of Richard Arthur Lewis Gilpin, and James Macon Davis and thereby discouraging membership in a labor organization, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act."

EXCEPTION No. 22

The evidence is insufficient to justify and the specific facts found do not justify and are inconsistent with the conclusion of law (commencing Line 16 to 19, Page 12) which reads as follows:

“3. By discriminating against James Macon Davis in regard to hire, tenure and conditions of employment because he gave testimony under the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (4) of the Act.”

EXCEPTION No. 23

The evidence is insufficient to justify and the specific facts found do not justify and are inconsistent with the conclusion of law (commencing Line 21 to 24, Page 12), which reads as follows:

“4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.”

EXCEPTION No. 24

That the evidence is insufficient to justify and the specific facts found do not justify and are inconsistent with the conclusion of law (commencing Line 26 to 28, Page 12), which reads as follows:

“5. The aforesaid unfair labor practices are unfair labor practices affecting commerce,

within the meaning of Section 2 (6) and (7) of the Act.”

EXCEPTION No. 25

That the evidence is insufficient to justify, the specific facts found do not justify and are inconsistent with the recommendation (commencing Line 57 to 61, Page 12) reading as follows:

“Offer to Richard Arthur Swope, Lewis Gilpin, and James Macon Davis immediate and full reinstatement to their former or substantially equivalent employment without prejudice to their seniority or other rights and privileges;”

EXCEPTION No. 26

That the evidence is insufficient to justify, the specific facts found do not justify and are inconsistent with the recommendation (commencing Line 1 to 6, Page 13), reading as follows:

“(b) Make whole Richard Arthur Swope, Lewis Gilpin, and James Macon Davis for any loss of pay they may have suffered by reason of the discrimination against them, by payment to each of them of a sum of money equal to that which he normally would have earned as wages from the date of his discriminatory discharge, as found herein, to the date of the respondent’s offer of reinstatement, less his net earnings during such period;”

EXCEPTION No. 27

That the findings of fact and conclusions of law in said Intermediate Report are at variance and inconsistent, in that in some places the Trial Examiner found that the three employees were "discharged", in other places he found that they were "laid off" and in still other places he found that they were "laid off or discharged."

EXCEPTION No. 28

That the evidence is wholly insufficient to justify the finding that the employees, Davis, Gilpin and Swope were discharged for union activities or otherwise, or that any other finding is proper, other than the fact that said employees were laid off because of lack of work.

EXCEPTION No. 29

That the findings of fact are insufficient, in that the Trial Examiner did not find that the respondent was justified in not rehiring the three employees because of their unpatriotic activities in their statements to fellow employees, discouraging the sale of war bonds and thereby creating dissension, in-harmony, interruption of and interference with production and discipline.

Respectfully submitted,

VICTOR FORD COLLINS and
ARNOLD M. CANNAN

By VICTOR FORD COLLINS

Attorneys for Kinner Motors,
Inc.

In the United States Circuit Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KINNER MOTORS, INC.,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board—Series 3, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding had before said Board entitled, "In the Matter of Kinner Motors, Inc. and International Association of Machinists, A.F.L.," the same being Case No. 21-C-2389 before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of order designating William E. Spencer Trial Examiner for the National Labor Relations Board, dated June 6, 1944.

(2) Stenographic transcript of testimony held before Trial Examiner Spencer, on June 6, 7, 8, 9,

and 12, 1944, together with all exhibits introduced in evidence.

(3) Copy of Intermediate Report of Trial Examiner Spencer, dated August 5, 1944 (annexed to Item 11 hereof).

(4) Copy of order transferring case to the National Labor Relations Board, dated August 8, 1944.

(5) Copy of respondent's letter, dated August 11, 1944, requesting an extension of time to file exceptions and brief, and requesting permission to argue orally before the National Labor Relations Board.

(6) Copy of Board's telegram, dated August 14, 1944, granting all parties an extension of time for filing exceptions and brief, and granting permission to argue orally before the Board.

(7) Copy of respondent's exceptions to the Intermediate Report.

(8) Copy of notice of hearing for the purpose of oral argument before the Board, dated November 11, 1944.

(9) Copy of respondent's telegram, dated November 14, 1944, requesting advancement of the oral argument date.

(10) Copy of Board's notice of advancement of hearing for the purpose of oral argument before the Board, dated November 15, 1944. Oral argument was held on November 30, 1944.

(11) Copy of decision and order issued by the National Labor Relations Board, December 13, 1944, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 6th day of February 1945.

[Seal]

JOHN E. LAWYER
Chief, Order Section
NATIONAL LABOR
RELATIONS BOARD

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KINNER MOTORS, INC.,
Respondent.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR
RELATIONS BOARD,

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant
to the National Labor Relations Act (Act of July

5, 1935, 49 Stat. 449, c. 372, 29 U.S.C. § 151, et seq.), respectfully petitions this Court for the enforcement of its order against respondent, Kinner Motors, Inc., Glendale, California, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Kinner Motors, Inc. and International Association of Machinists, A.F.L., Case No. 21-C-2389."

In support of this petition, the Board respectfully shows:

(1) Respondent is a California corporation, and is engaged in business in the State of California, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof, certified by the Board and filed with this Court herein, to which reference is hereby made, the Board, on December 13, 1944, duly issued an order directed to the respondent, its officers, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in the case, and pursuant to Section 10 (e) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Kinner Motors, Inc.,

Glendale, California, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, affiliated with the American Federation of Labor, or in any other labor organization of its employees, by discriminating in regard to the hire or tenure of employment of any of its employees, or any term or condition of employment;

(b) Discharging or otherwise discriminating against any employee because he has given testimony under the Act;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, affiliated with the American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Richard Arthur Swope, Lewis Gilpin, and James Macon Davis immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges;

(b) Make whole Richard Arthur Swope, Lewis Gilpin, and James Macon Davis for any loss of pay they may have suffered by reason of the respondent's discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during said period;

(c) Post immediately in conspicuous places in each of its Glendale, California, plants, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1(a), (b), and (c) of this Order; (2) that the respondent will take the affirmative action set forth in paragraphs 2(a) and (b) of this Order; and (3) that the respondent's employees are free to become or remain members of International Association of Machinists, affiliated with the American Federation of Labor, and that the respondent will not discriminate against any employee because of membership in or activity on behalf of that organization;

(d) Notify the Regional Director for the Twenty-first Region, in writing within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

(3) On December 13, 1944, the Board's decision and order was served upon respondent by sending

a copy thereof postpaid, bearing Government frank, by registered mail, to respondent's attorneys.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring respondent, its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR RELATIONS
BOARD

MALCOLM F. HALLIDAY

Associate General Counsel

Dated at Washington, D. C., this 6th day of February 1945.

District of Columbia—ss.

Malcolm F. Halliday, being first duly sworn, states that he is Associate General Counsel of the National Labor Relations Board, petitioner herein,

and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

MALCOLM F. HALLIDAY

Associate General Counsel

Subscribed and sworn to before me this 6th day of February 1945.

[Seal]

JOHN E. LAWYER

Notary Public, District of
Columbia

My Commission Expires August 14, 1949.

[Endorsed]: Filed Feb. 12, 1945.

[Title of Circuit Court of Appeals and Cause.]

ANSWER TO PETITION

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Comes now the respondent, Kinner Motors, Inc., in answer to the Petition for Enforcement of an Order of the National Labor Relations Board and denies and alleges as follows:

I.

That there is no substantial evidence to support the Findings of Fact.

II.

That the facts found by the Board are insufficient to sustain the order that the respondent is engaged in unfair labor practices within the meaning of Section 8 (1), (3) and (4) of the Act.

III.

That the Board's order is invalid.

IV.

That the evidence is insufficient to sustain the facts found that the employees were discharged and the only evidence is to the effect that the said employees were laid off.

V.

That the evidence is insufficient to sustain the findings that the respondent was not justified in rehiring the said employees by reason of their unpatriotic conduct in their statements concerning War Bond sales.

VI.

That the Board's order is invalid.

Wherefore, respondent prays that the Petition to Enforce the Order be denied and for such other and further relief as shall be meet and proper.

VICTOR FORD COLLINS

Attorney for Respondent,
Kinner Motors, Inc.

State of California,
County of Los Angeles—ss.

Victor Ford Collins, being by me first duly sworn,
deposes and says:

That he is the attorney for Kinner Motors, Inc.,
the respondent in the above entitled matter; that
the matters therein set forth are true of his own
knowledge, except as to matters therein stated on
his information and belief, and as to those matters
that he believes it to be true.

VICTOR FORD COLLINS

Subscribed and sworn to before me this 28 day
of February, 1945.

[Seal] HERSCHEL B. GREEN

Notary Public in and for the County of Los Angeles
State of California.

[Endorsed]: Filed Mar. 5, 1944.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KINNER MOTORS,

Respondent.

ON PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

STATEMENT OF POINTS RELIED UPON
BY THE BOARD

Pursuant to Section 6 of Rule 19 of the Court, the Board submits the following statement of points upon which it intends to rely in the above-entitled proceeding:

I.

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meanings of Sections 8 (1), (3) and (4) of the Act.

II.

The Board's order is valid.

Dated at Washington, D. C., this 6th day of February 1945.

MALCOLM F. HALLIDAY

Associate General Counsel,
National Labor Relations
Board.

[Endorsed]: Feb. 12, 1945.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED
UPON BY RESPONDENT

Pursuant to Section 6 of Rule 19 of the Court, the respondent, Kinner Motors, Inc., submits the following Statement of Points upon which it intends to rely in the above entitled proceeding:

I.

That there is no substantial evidence to support the Findings of Fact.

II.

That the facts found by the Board are insufficient to sustain the order that the respondent is engaged in unfair labor practices within the meaning of Section 8 (1), (3) and (4) of the Act.

III.

That the Board's order is invalid.

IV.

That the evidence is insufficient to sustain the facts found that the employees were discharged and the only evidence is to the effect that the said employees were laid off.

V.

That the evidence is insufficient to sustain the findings that the respondent was not justified in rehiring the said employees by reason of their unpatriotic conduct in their statements concerning War Bond sales.

VI.

That the Board's order is invalid.

VICTOR FORD COLLINS,
Attorney for Respondent,
Kinner Motors, Inc.

[Endorsed]: Filed Mar. 5, 1944.

CCA #10984

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America.

To Kinner Motors, Inc., 635 West Colorado, Glendale, California, and International Association of Machinists, AFL, Att. Mr. A. C. McGraw, 9221 $\frac{1}{2}$ San Fernando Road, Burbank, California.

Greeting:

Pursant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Re-

lations Board Act, Section 10(e)), you and each of you are hereby notified that on the 12th day of February, 1945 a petition of the National Labor Relations Board for enforcement of its order entered on December 13, 1944 in a proceeding known upon the records of the said Board as "In the Matter of Kinner Motors, Inc., and International Association of Machinists, A.F.L., Case No. 21-C-2389," and for entry of a decree by the United States Circuit Court of Appeals for the Ninth Circuit, was filed in the said United States Circuit Court of Appeals for the Ninth Circuit copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Circuit Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, this 12th day of February in the year of our Lord one thousand, nine hundred and forty-five.

[Seal] PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

RETURN ON SERVICE OF WRIT

United States of America,
Sou. District of Calif.—ss.

I hereby certify and return that I served the annexed order to show cause on the therein-named

A. C. McGraw, International Association of Machinists, 922½ San Fernando Road, Burbank, Calif., by handing to and leaving a true and correct copy thereof with him personally at Burbank, Calif. in said District on the 15th day of February, 1945.

ROBERT E. CLARK

U. S. Marshal.

By GEORGE V. ROSSINI,

Deputy.

Marshal's Fees	\$ 4.00
Mileage	1.60
	<hr/>
Total	\$ 5.60

RETURN ON SERVICE OF WRIT

United States of America,
Sou. District of Calif.—ss.

I hereby certify and return that I served the annexed order to show cause on the therein-named Kinner Motors, Inc., 635 West Colorado, Glendale, Calif. by handing to and leaving a true and correct copy thereof with Victor E. Senrau, Secretary-Treasurer personally at Glendale, Calif. in said District on the 15th day of February, 1945.

ROBERT E. CLARK,

U. S. Marshal.

By GEORGE V. ROSSINI,

Deputy.

[Endorsed]: Filed Feb. 26, 1944.

Before the National Labor Relations Board
Twenty-First Region.

Case No. 21-C-2389

In the matter of:

KINNER MOTORS, INC.

and

INTERNATIONAL ASSOCIATION OF MA-
CHINISTS, A.F.L.

Room 901 Board of Trade Building,
111 West 7th Street,
Los Angeles, California,
Tuesday, June 6, 1944.

PROCEEDINGS

Trial Examiner Spencer: The hearing is in order.

This is a formal hearing before the National Labor Relations Board in the matter of Kinner Motors, Inc., and International Association of Machinists, A. F. of L.; Case No. 25-C-2389.

The Trial Examiner appearing for the National Labor Relations Board is William E. Spencer.

I note the following appearances:

For the respondent, Kinner Motors, Inc., Victor Ford Collins, 111 Board of Trade Building, Los Angeles, California.

Appearing for the National Labor Relations Board is William B. Esterman.

*Page numbering appearing at top of page of original certified Transcript of Record.

Are there any other appearances?

Mr. Collins: Yes, I would like the record to show that Arnold M. Cannan is associated with me in this hearing.

Trial Examiner Spencer: And the address?

Mr. Collins: The same as mine.

Trial Examiner Spencer: Is he associated with your firm?

Mr. Collins: We do not have a firm. He is associated with me in this case.

Trial Examiner Spencer: In this hearing?

Mr. Collins: Yes. [3]

Mr. McGraw, A. C. McGraw, Lodge 758 of the International Association of Machinists.

Trial Examiner Spencer: Will you let us have your address, please.

Mr. McGraw: 9221½ South San Fernando Road, Burbank, California.

EMMETT J. SULLIVAN

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination [10]

Q. Now, you have before you the personnel file of Richard [25] Swope? A. Yes.

Q. Will you refer me, Mr. Sullivan, to those questions of the file which relate to Mr. Swope's classification—if I may use that word—from the time he was with the company until the time he left?

(Testimony of Emmett J. Sullivan.)

A. I have copies of what we call "Change of Status Notice," showing any change that affected the employee's pay or classification as far back as we could compile records, when I started to make up records over there.

Q. So that, according to your personnel file, unless counsel objects, I am not going to ask for anything in evidence unless I think it should be. In order to save time I am going to refer to these matters.

Mr. Collins: I have no objection.

Q. (By Mr. Esterman): According to your personnel file, with respect to Mr. Swope, he was, at least on August 16, 1943, classified as a radial drill press operator, and on that date, August 16, 1943, reclassified as a tool maker.

A. Class C tool maker.

Q. Is that correct?

A. Change of classification, and promotion, they called it.

Trial Examiner Spencer: Was it a promotion?

The Witness: To a higher classification. [26]

Mr. Esterman: I think the witness was testifying from the Change of Status Notice.

Q. (By Mr. Esterman): Were you not?

A. Yes.

Q. "Reason for the Change"? A. Yes.

Q. "Change of Classification; Promotion"?

A. That is correct.

Q. Now, will you show me the same informa-

(Testimony of Emmett J. Sullivan.)

tion, if you will please, with respect to Mr. Gilpin, Lewis Gilpin? A. Yes.

Q. This shows, does it not, Mr. Sullivan, that from July 16, 1943, until August 16, 1943, Mr. Gilpin was classified as a Class A Machinist, and prior to the first date I mentioned he was classified as a Class B Machinist; is that correct?

A. Yes, that classification is according to the hourly rate, you see.

Q. That is to say, that a Class A machinist might be doing the same work as a Class B machinist, but he is getting more money.

A. No, sir.

Q. What does it indicate?

A. He must qualify as a Class A in accordance with the job description, and the rate is given for the higher qualifications of A, B and C classifications. [27]

Q. How, in general, does a B machinist qualify for an A machinist rating?

A. He becomes more proficient in setup work, doing operations on that, which requires closer tolerances, etc.

Q. Have you finished? A. Yes, sir.

Q. There is no particular line you draw, however, with respect to particular things he can or cannot do? Isn't that a fact, that the change in classification comes when, in the judgment of the company or management, the man has improved to the extent he rates a higher rate of pay and higher classification? Isn't that substantially the

(Testimony of Emmett J. Sullivan.)

fact? If it isn't, will you tell me what is the fact?

A. That would be the logical thing to do, is to only reclassify a man when he deserved a reclassification. But we are not always able to do that. We are required, in many cases, in order to keep our men, to pay them a nickel or dime more an hour, and by so doing, to be in accord with our rate schedules, we must reclassify them to C, B or an A, as the case may be. Many times they don't deserve the classification, but it is either pay them the money or lose them. I won't say that all our Class A men in our plant today would be class C men of 10 years ago or 5 years ago; if that has any bearing on the subject.

Q. I will accept your answer. So that on Board's Exhibit [28] 2, the classification of Gilpin, machinist, in fact, that is what he was? A. Yes.

Q. Do you have the same data relating to James M. Davis? A. Yes.

Q. Now, your personnel file with respect to Davis shows that—I am not excluding other dates in mentioning this date, but I am picking this one—on March 9th, effective date March 3rd, James M. Davis was classified as a toolmaker in the tool room. Does this C mean anything?

A. That is the lowest classification of tool makers.

Q. He was classified as tool maker C at \$1.05?

A. That is correct. He was given a 5 cent increase as a merit increase.

(Testimony of Emmett J. Sullivan.)

Q. That is March 16th?

A. That is right.

Q. Your file also shows subsequently on July 12th, effective July 16th, he was reclassified to tool maker Class B at \$1.15 an hour. "Reason for Change: Merit Increase"; is that correct?

A. That is correct.

Trial Examiner Spencer: That is what date? Reclassified what date?

Mr. Esterman: July 12, 1943; effective the 16th.

Q. (By Mr. Esterman): It also shows, does it not, that [29] on July 16th, effective July 16, 1943, he was reclassified? A. No.

Q. No, he wasn't reclassified. What does it show? Will you tell me?

A. He was given a 5 cent an hour night bonus after we received approval of the War Labor Board.

Q. That is from \$1.15 to \$1.20?

A. No, \$1.15 plus 5 cent bonus. That is removable if he goes to the day shift.

Q. That is not part of the rate? A. No.

Q. On July 16, 1943, he became what you here describe as a Junior Tool Maker, occupational Code No. B. On November 29, 1943, effective December 1, 1943, under the same classification he received a merit increase for superior quality work; did he not? A. That is correct.

Q. On that date, the date I have just mentioned, his rate became \$1.20 an hour plus night bonus?

A. Yes.

(Testimony of Emmett J. Sullivan.)

Q. What is the difference between a tool maker and a junior tool maker?

A. A junior tool maker is the beginner in the tool room. He does the simpler jobs. The old timer brings him along and teaches him. It is more or less an apprenticeship class- [30] ification.

Q. I am interested in your answering that question in the light of the job history which we have just discussed, which shows he was a junior tool maker after he was with the company some time, instead of at the beginning.

A. Yes, he didn't start in the tool room. He might have started in the machine shop. The machine shop and the tool room are a good many miles apart when it comes to skill and ability.

Q. Does your record show when he went in the tool room in Plant 1?

A. Well, I would say a Class C, he would have to start here. Our lowest price for tool maker, I believe is 90 or 95 cents an hour.

Q. He was at that time, in March, 1943?

A. Yes, sir, that is correct.

Q. According to your personnel file, can you tell me approximately when he went in the tool room? Can you tell from any records?

A. Yes, it indicates that he received the starting rate in the tool room March 16th—no, March 9th. He was in the tool room that period. This was effective March 16th.

Q. As a tool maker C?

A. Correct.

(Testimony of Emmett J. Sullivan.)

Q. As a tool maker C, according to your schedule of [31] classifications, he is less qualified than a junior tool maker?

A. No. If he is a Class C tool maker, he is the lowest. He is the starting rate of tool maker. Sometimes they put "junior" before that, write it in. It isn't necessary. It determined by the rate.

Q. Well, what I am trying to get at is this: When you use the word "tool maker" as against the words "junior tool maker", you mean two different things, don't you?

A. A junior tool maker, at \$1.00 an hour, is the same as a Class C tool maker at \$1.10 an hour.

Q. What is the highest rate approximately that tool makers are paid now at your plant?

A. At our plant?

Q. Yes. A. \$1.45 an hour.

Q. Ranging from what low rate?

A. I believe it is 95 cents. The lowest, the minimum of Class C, to the maximum of Class A.

Q. However, you couldn't tell from a man's rate whether he was a tool maker, junior tool maker or Class C, or any other class?

A. Yes, you could from his rate.

Q. You could tell exactly?

A. Yes, because the rate changes. When he reaches a certain amount he is at the end of his rate range for the [32] Class C, and his next raise or promotion takes him into the minimum of the Class B; progresses through that way.

(Testimony of Emmett J. Sullivan.)

Q. Do you know what the wage rate range for tool makers was in February, 1944?

A. It is the same as it was in our plant in February, 1944. It has been the same since July 5, 1943, when our approved rate ranges were returned from the War Labor Board.

Q. I am now using the word "tool maker" in the sense you distinguished it from the other kinds of tool makers.

A. Yes.

Q. I am asking what the wage rate range was for tool makers of the higher grade, as distinguished from the others. I don't mean the whole range, but the range from the top classification of tool makers.

A. The same as it was July 5, 1943.

Q. You don't mean that a top grade tool maker would make 90 cents an hour in February?

A. I misunderstood you.

Q. I want a range for the particular classification. When I say classification I mean the highest grade of tool maker, the highest point. Would that be \$1.40?

A. The Class A maximum is \$1.45.

Q. What is the minimum?

A. You have got me. I can't remember. There are a lot of them, 300 of them. I can't keep them in my head. I could [33] have brought my rate range.

Q. Is there a minimum?

A. Yes, there is a minimum of each classification. [34]

(Testimony of Emmett J. Sullivan.)

Q. Now, the company operates what are known as Plants 1 and 2, does it not, in Glendale?

A. That is correct.

Q. When you came with the company in July, 1942, were there two plants or just one plant?

A. There were two.

Q. Was Plant 2 in the process of building or preparation?

A. It was in the process of tooling for an engine that never got into production due to cancellation.

Q. The plant wasn't producing at the time you came?

A. It wasn't producing, no sir; it was tooling.

Q. Is Plant 2 producing now?

A. Yes, sir.

Q. When did it start producing?

A. Approximately, I would say March or April of this year, to the best of my knowledge; it is not official.

Q. You mean 1944? A. Yes. [38]

Q. However, there were a number of people employed before that date? A. Yes, sir.

Q. In Plant 2? A. Yes.

Q. In general, what were they occupied with in Plant 2?

A. They were occupied with tooling and with various machine operations on the product, but when I say production I mean the completion of at least some finished pieces of what we are making.

Q. You mean they were occupied with production before March or April of this year?

(Testimony of Emmett J. Sullivan.)

A. Yes. There were parts going through the preliminary operation.

Q. Before that time, in Plant 2?

A. Yes, some before that time. They had to complete the operations and get some shipped before I would say it was in production. That is what I mean.

Q. When you went into production, if I may use that expression, in Plant 2, did you require additional help in the way of machine operators, and so on?

A. No, sir, we have to have and had to have that force before actual completion of any of the pieces.

Q. You say you went into production in Plant 2 with the same people that tooled up the plant; is that what you are [39] saying?

A. Yes, that is correct.

Q. You didn't hire any people to go into Plant 2?

A. Yes, we are replacing all the time. We have to hire a hundred people a month to keep even.

Q. Did you, from time to time, take people in Plant 2 from Plant 1?

A. Yes, sir.

Q. And vice versa?

A. No.

Q. You have never moved anyone from Plant 2 into Plant 1?

A. Not to any great extent. There might have been a test stand man or so moved back and forth, a welder; no great groups were ever sent from Plant 2 to Plant 1.

(Testimony of Emmett J. Sullivan.)

Q. You are not saying there were no transfers, are you?

A. I couldn't state that there were any official transfers of employees from Plant 2 to Plant 1, unless I checked the records to see.

Q. You don't know then? A. No, sir.

Q. Do both plants have tool rooms?

A. Yes, sir.

Q. Now, Plant 1 works, does it not, on the first and second shift arrangement, that is, two shifts, one day and one night? [40]

A. They have two shifts.

Q. Two shifts? A. That is correct.

Q. Is that also true of Plant 2?

A. That is correct.

Q. Has that been true of Plant 2 since it started operating? Has that always been true of the plants since you came with the company?

A. When I first came with the company the Plant 2 had a night shift of a very small number of men, no productive people, no machine operation; they were tooling. But they did have a 2-shift setup, so that when the time came to fill up the night shift they had it all set up.

Q. Where did they get their people for the night shift? Did they get some from the day shift?

A. Very few were transferred from the day shift to the night shift; the reverse is true.

Q. They got some?

A. I couldn't tell to any great—

(Testimony of Emmett J. Sullivan.)

Q. I am interested in your last remark, when you say very few transferred that way. Have people transferred from the night shift to the day shift in your experience? A. Yes.

Q. In both plants?

A. Yes. We give them the privilege, when there is an [41] opening on the day shift they have the privilege of taking it.

Q. That is at the request of the employees?

A. That is right; lots of them don't want to work then.

Q. Has the company, at any time in your experience, requested of employees as to whether they wish or would like to be transferred from one shift to the other, in order to suit the production requirements of the company?

A. When they are hired in the personnel department, we have to hire them on the night shift when there is no day opening. We leave it to their supervisory people in the plant to talk it over with them and let them change if there is a suitable opening.

Trial Examiner Spencer: This last exhibit marked No. 2 for identification, you have not offered it. Did you intend to offer it?

Mr. Esterman: I intended to offer it, but I want to know more about it.

Please mark this as Board's Exhibit 3.

(Thereupon, the document referred to was marked as Board's Exhibit No. 3, for identification.)

(Testimony of Emmett J. Sullivan.)

Q. (By Mr. Esterman): I show you a document marked Board's Exhibit 3, Mr. Sullivan, bearing the heading "4(B) The Names and Classifications of all Employees of Kinner Motors, Inc., Whose Employment was terminated during [42] the period from August 1, 1943, to April 20, 1944, by reason of a reduction of force or lack of work due to cancellation of contracts or orders for the production of goods, together with the date of each such termination."

Mr. Esterman: I will state this document was handed to me by counsel as being a tabulation of the data requested in paragraph 4 (B) in the subpoena.

Q. (By Mr. Esterman): I will ask you if you will state for the record, in brief, how this document was prepared?

A. That was tabulated by my personal secretary from the daily personnel sheets.

Q. That is to say, you have some form of daily report indicating layoffs? A. Yes, sir.

Q. And including the names and dates, classifications, et cetera, of each person involved?

A. Yes.

Q. By going over those daily sheets from August, 1943, to April 1944, your secretary was able to obtain this information? A. Yes, sir.

Q. I take it, referring to the bottom of the page, that there were no terminations after March 28th and before April 20th shown here; that there were,

(Testimony of Emmett J. Sullivan.)

in fact, no terminations for this reason; is that correct? [43]

Mr. Collins: I didn't understand that.

The Witness: I didn't get that, either.

Mr. Esterman: I will say it over again.

Q. (By Mr. Esterman): This means, Mr. Sullivan, doesn't it, that between March 28, 1944 and April 20, 1944, there was no one discharged by the company for lack of work or due to cancellation of contracts or because of reduction of forces.

Mr. Collins: I object to that on the ground it is a misconstruction of the instrument. If I understand your question it, on the face, says they were laid off, right down the side "Reason for termination."

Mr. Esterman: I will say it again.

Trial Examiner Spencer: Do you want the reporter to read it?

Mr. Esterman: I want to know if this document is complete to April 20th, and I am asking the witness if it isn't a fact, from looking at the document, that between March 28th, which is the last discharge on it, and April 20th, if it isn't a fact there were no discharges during that period for these reasons?

Trial Examiner Spencer: For the reasons stated on the document?

Mr. Esterman: Yes.

Q. (By Mr. Esterman): Referring to Board's Exhibit 3, [44] Mr. Sullivan, for identification, and looking at the second name, D. B. Jowidin, engine

(Testimony of Emmett J. Sullivan.)

assembler, do you know what work that man was doing at the time? In general, I mean, not specifically? A. Yes.

Q. What work was he doing?

A. He was doing field installations of our engines.

Q. Does field mean some place other than the plant? A. That is correct.

Q. Away from the plant?

A. That is correct. They all go out from the plant on these jobs.

Q. Is that also true, in general, of the other persons designated as engine assemblers on that sheet? I am referring to Board's Exhibit 3.

A. That is correct.

Q. At least, it is generally true? A. Yes.

Q. Now, what is the fact with respect to the person named John Russo, final assembler, what work was he doing at that time, if you know?

A. He was doing motor mount installation on one of the various air fields.

Q. To make this short, although the classifications beginning with the second and ending with the name Alonzo [45] Phillips, those classifications between those two names refer to persons who, when they were terminated, were working as you describe it in the field. A. That is correct.

Q. Is that correct? A. Yes.

Q. Thank you. Now, will you look at the last name of Nilsen, welder, and tell me if you know

(Testimony of Emmett J. Sullivan.)

where he was working at the time he was terminated.

A. Working in the test stands in Plant 2.

Q. Is that in connection with the testing of engines?

A. That is correct.

Q. It was your statement, wasn't it, that the welder was working in Plant 2?

A. In the test stands in Plant 2.

Q. Do you know that?

A. Yes, I happened to be there when he terminated.

Mr. Esterman: Please mark this as Board's exhibit next in order.

(Thereupon, the document referred to was marked as Board's Exhibit No. 4, for identification.)

Q. (By Mr. Esterman): I show you a document, Mr. Sullivan, which has been marked for identification as Board's Exhibit 4, and which consists of six pages, and which I will state has been in my possession since yesterday and was furnished [46] me by your counsel with the general statement it represents a tabulation of the data for which paragraph 4(C) in the subpoena calls. The document is entitled "The Names and Classifications of all Persons hired or rehired by Kinner Motors, Inc., from January 1, 1944, to April 20, 1944, for work on production and/or tool department jobs, at a wage rate of 85 cents per hour or more, together with the date of each hiring or rehiring."

(Testimony of Emmett J. Sullivan.)

I will ask you if you will state generally in what manner this document was prepared, if you know?

A. It was also prepared by my secretary in my own office from the daily personnel records.

Q. That is to say, you have the records to show the names of the persons hired and the other data with respect to the jobs to which they are hired and the wage rate and the plant to which they are sent; is that correct?

A. That is correct.

Q. This represents then, this list shows, rather, the names and the other data in the other 4 columns relating to all persons answering the description at the heading of the page, who were hired between January 1, 1944 and April 20, 1944; is that correct?

A. That is correct.

Q. Any one that has been hired during that period, for work on production and/or to department jobs at 85 cents per [47] hour, whether in Plant 1 or Plant 2, would be in this list; is that correct? [48]

(The documents referred to were marked as Board's Exhibits 2, 3, 4, 5-A to 5-J for identification and received in evidence.)

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 2

4 (A) The names and classifications of all persons employed by the Kinner Motors, Inc., on the night shift in Plant One during the payroll period which included August 1, 1943.

Name	Pencil notations	Classification
Albert E. Stalker	to #2, Aug. 4, '43	Engine Lathe Opr.
Fred E. Brown	no change	Machinist
James E. Wilson	terminated 12/23/24	Test Stand Opr.
Roy C. Walker	no change	Milling Machine Opr.
Henry F. Roth	terminated 9/29/43	Radial Drill Opr.
Brian C. Johnson	night foreman	Machinist
Henry J. Woodsford	to Plant 2 Sep. 8, '43	Machinist
Leslie M. Dayhoff	no change	Engine Lathe Opr.
Alfred Woodsford	to #2, 9/8/43	Machinist
Edward W. Anderson	to #2, 8/4/43	Turret Lathe Opr.
Richard Swope		Radial Drill Opr.
John Szabo	no change	Machinist
Ronnie Linkogle	no change	Radial Drill Opr.
Lewis E. Gilpin		Machinist
James M. Davis		Jr. Toolmaker
Frank C. Keeley	terminated 8/23/43	Machinist
Oren H. Cadaret	to #2, 10/1/43	Milling Machine Opr.
Wallace T. Gerth	no change	Engine Lathe Opr.
Harley J. James	term. Oct. 19, 1943	Drill Press Opr.

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 3

4 (B) The names and classifications of all employees of Kinner Motors, Inc., whose employment was terminated during the period from August 1, 1943 to April 20, 1944 by reason of a reduction of force or lack of work due to cancellation of contracts or orders for the production of goods, together with the date of each such termination.

Name	Plant	Date Terminated	Classification	Reason for Termination	(Layoffs)
Lawrence Brown	2	8-18-43	Maintenance Man	Lack of work	
D. B. Jowidin	1	10-18-43	Engine Assembler	Motor mount installations completed (Field work)	
W. H. Trucker	1	10-18-43	Engine Assembler	"	"
Mark Smothers	1	10-18-43	Engine Assembler	"	"
L. H. Parsons	1	10-18-43	Engine Assembler	"	"
J. O. Haberreiter	1	10-18-43	Engine Assembler	"	"
Phillip W. Paulsen	1	10-18-43	Engine Assembler	"	"
William Duerkson	1	10-23-43	Engine Mechanic	"	"
John Russo	1	11- 1-43	Final Assembler	"	"
Henry B. Steadman	1	11- 1-43	Final Assembler	"	"
Hayden L. Miller	1	11- 1-43	Engine Assembler	"	"
Clayton E. Dove	1	11- 1-43	Final Assembler	"	"
Frank Sota	1	11-13-43	Engine Mechanic	"	"
Paul Arnett	1	11-13-43	Engine Assembler	"	"

(Testimony of Emmett J. Sullivan.)

Board's Exhibit No. 3—(Continued)

Name	Plant	Date Terminated	Classification	Reason for Termination	(Layoffs)
Marion Henderson	1	11-13-43	Engine Mechanic	Motor mount installations completed (Field Work)	
Gordon La Fond	1	11-23-43	Engine Assembler	"	"
Alonzo Phillips	1	11-23-43	Engine Assembler	"	"
Richard Swope	1	2-16-44	Jr. Toolmaker	Lack of work.	Tool room closed.
James M. Davis	1	2-23-44	Jr. Toolmaker	"	"
Lewis Gilpin	1	2-23-44	Machinist	"	"
Nils F. Nilsen	2	3-28-44	Welder	Lack of work.	

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 4

4 (C) The names and classifications of all persons hired or rehired by Kinner Motors, Inc., from January 1, 1944 to April 20, 1944, for work on production and/or tool department jobs, at a wage rate of 85c per hour or more, together with the date of each such hiring or rehiring.

Name	Date Hired	Classification	Rate	Plant
Frank Cali	1- 5-44	Radial Drill Operator .....	.85	2
Ralph Wintrobe*	1- 5-44	Grinder .....	.95	2
Carl Nowacki	1- 6-44	Grinder	1.30	2
Sidney Brown	1- 6-44	Boring Machine Operator	1.10	2
Harold L. Frederickson	1- 6-44	Drill Press Operator .....	.95	2
James C. Heffner	1- 6-44	Radial Drill Operator	1.00	2
Robert Fagg	1- 7-44	Toolmaker	1.30	2
Robert Bray	1- 8-44	Grinder	1.00	2
William Grunau	1-10-44	Assembler .....	.85	2
Henry Bocchini	1-10-44	Test Mechanic .....	.95	2
Arthur Jackson	1-10-44	Milling Machine Operator	1.00	2
Frank Hauglum	1-10-44	Radial Drill Operator	1.00	2
Bernard Green*	1-10-44	Test Mechanic .....	.95	2
Joe Arell	1-10-44	Internal Grinder	1.00	2
Landis Little	1-12-44	Assembler .....	.85	2

* Rehired—Returned from leave of absence.

Board's Exhibit No. 4—(Continued)

(Testimony of Emmett J. Sullivan.)

Name	Date Hired	Classification	Rate	Plant
Edward W. Borne	1-12-44	Boring Machine Operator	1.10	2
Dale E. Maxwell	1-13-44	Assembler	.90	2
Clayton L. Gross	1-13-44	Grinder	1.20	2
Nathan F. Hibbs	1-13-44	Boring Machine Operator	1.00	2
Ludlow S. Fahnestock	1-14-44	Radial Drill Operator	.95	2
Paul E. Kleef	1-14-44	Test Mechanic	.95	2
Erasmo Bianco	1-14-44	Radial Drill Operator	1.00	2
Leon A. Gendreau	1-17-44	Grinder	1.10	2
Ward V. Howeth	1-17-44	Assembler	.95	2
Lyman W. Sanders	1-17-44	Radial Drill Operator	.95	2
Harold T. Jones	1-17-44	Radial Drill Operator	.95	2
James T. Holbrook	1-18-44	Assembler	.90	2
Ralph Slate	1-18-44	Boring Machine Operator	1.00	2
John E. Fitzgerald	1-19-44	Toolmaker	1.00	2
Eugene O. Davis	1-20-44	Grinder	1.20	2
Clarence L. Gibbs	1-20-44	Assembler	.85	2
Edward Kantak	1-24-44	Assembler	.85	2
Frank A. Bell	1-24-44	Radial Drill Operator	.90	2
Norman Searle	1-25-44	Assembler	1.25	2
Leo Erickson	1-28-44	Grinder	1.10	2
Frank Wislowsky	1-31-44	External Grinder	1.10	2

(Testimony of Emmett J. Sullivan.)

Name	Date Hired	Classification	Rate	Plant
Leslie R. Hayes	1-31-44	Radial Drill Operator	1.10	2
Walter Chung	2-1-44	Tool and Cutter Grinder	1.25	2
George A. Swehla*	2-1-44	Radial Drill Operator	1.05	2
Robert A. R. Morris	2-2-44	Assembler	1.00	2
Lucious E. Converse	2-2-44	External Grinder	1.00	2
Leonard F. Abels	2-3-44	Assembler .....	.95	2
Harvey G. Cromwell	2-3-44	Machinist	1.10	2
J. G. Gottloeb	2-3-44	Grinder	1.20	2
Linda M. Lybeck	2-4-44	Radial Drill Operator .....	.85	2
T. N. Hayward	2-4-44	Assembler	1.00	2
Earl R. Donat	2-7-44	Milling Machine Operator	1.20	2
Norris C. Dahl	2-7-44	Milling Machine Operator	1.00	2
William A Ray	2-7-44	Assembler .....	.90	2
Paul R. Burt	2-7-44	Toolmaker	1.35	2
Robert Kurkowski	2-7-44	Buffer	1.00	2
Matthew J. Sauter	2-7-44	Assembler .....	.85	2
P. N. Casanta	2-8-44	Assembler .....	.90	2
Lavern Tudor	2-8-44	Assembler .....	.90	2
H. C. Arell	2-8-44	Grinder	1.00	2

* Rehired—Returned from leave of absence.

(Testimony of Emmett J. Sullivan.)

Board's Exhibit No. 4—(Continued)

Name	Date Hired	Classification	Rate	Plant
Robert Hoffman	2- 9-44	Test Stand Mechanic	1.00	2
Max Pecarsky	2- 9-44	Tool and Cutter Grinder	1.30	2
C. A. Florkosky	2- 9-44	Radial Drill Operator .....	.90	2
Alex Bohachef	2-14-44	Boring Machine Operator .....	.90	2
Joseph Wyllie	2-15-44	Milling Machine Operator .....	.85	2
Robert J. March	2-15-44	Boring Machine Operator	1.00	2
Ray C. Drumheiser	2-16-44	Radial Drill Operator .....	.90	2
William Higson	2-17-44	Toolmaker	1.25	2
Oscar Puckett	2-21-44	Milling Machine Operator	1.20	2
William E. March	2-21-44	Radial Drill Operator	1.00	2
Ray B. Carter	2-25-44	Radial Drill Operator .....	.95	2
A. J. Berman	2-25-44	Radial Drill Operator	1.00	2
Salvatore Gennuso	2-27-44	Grinder	1.25	2
Afton B. Jones	2-28-44	Radial Drill Operator	1.00	2
Leo F. Munkachy	2-28-44	Surface Grinder	1.00	2
Jack S. Johnson	2-28-44	Assembler .....	.85	2
Louis Zimman	2-28-44	Engine Lathe Operator	1.20	2
Norman E. Walker	3- 1-44	Boring Machine Operator	1.15	2
Carl E. Guillemin	3- 2-44	Assembler .....	.90	2
Umberto Battinelli	3- 3-44	Internal Grinder	1.10	2
Jas. W. Rising	3- 3-44	External Grinder .....	.95	2

(Testimony of Emmett J. Sullivan.)

Board's Exhibit No. 4—(Continued)

Name	Date Hired	Classification	Rate	Plant
Paul C. Rand	3- 6-44	Assembler .....	.95	2
John A. Gallian	3- 6-44	Assembler .....	.95	2
R. H. Haakinson	3- 6-44	Milling Machine Operator	1.00	2
Ralph H. Fox	3- 6-44	Milling Machine Operator	1.00	2
Alfred Thurston	3- 6-44	Grinder	1.00	2
Richard Poe*	3- 6-44	Grinder	1.30	2
George Haffron	3-10-44	Assembler .....	.90	2
Harry McLaurin	3-10-44	Assembler .....	.90	2
David Kapean	3-10-44	Grinder	1.25	2
Dennis Moorehead	3-14-44	Assembler .....	.90	2
Daniel Clendennin	3-15-44	Assembler .....	.90	2
Walter A. Noek	3-17-44	Milling Machine Operator	1.10	2
Harley Gatlin	3-17-44	Assembler .....	.95	2
Chas. L. LeMasters	3-17-44	Assembler .....	.95	2
William F. Neville	3-20-44	Assembler .....	.90	2
Allan P. Dearth	3-20-44	Assembler	1.00	2
Fred Ungerland	3-20-44	Assembler .....	.90	2
William S. Hope	3-20-44	Milling Machine Operator	1.00	2
Jas. S. Langlais	3-21-44	Assembler	1.00	2

* Rehired—Returned from leave of absence.

(Testimony of Emmett J. Sullivan.)

Board's Exhibit No. 4—(Continued)

Name	Date Hired	Classification	Rate	Plant
John C. Old	3-21-44	Grinder	1.00	2
Ernest White	3-21-44	Radial Drill Operator .....	.85	2
Lester Daniels	3-21-44	External Grinder	1.00	2
Clarence E. Greth	3-22-44	Machinist	1.05	2
August Casanova	3-23-44	Milling Machine Operator .....	.95	2
Wayne E. Faylor	3-23-44	Milling Machine Operator	1.00	2
A. Stark Oliver	3-23-44	Buffer and Polisher .....	.95	1
Mildred Felix	3-23-44	Radial Drill Operator .....	.85	2
Fred C. Krueger	3-24-44	Radial Drill Operator .....	.90	2
William Billington	3-24-44	External Grinder	1.10	2
John Gregory	3-24-44	Buffer	1.00	2
Harold R. Brossette	3-27-44	Grinder	1.15	2
Robert J. Candy	3-29-44	Assembler .....	.85	2
Henry P. Beeton	3-29-44	External Grinder	1.00	2
Lester D. Yates	3-29-44	Machinist	1.25	1
John D. Newhouse	3-30-44	Test Operator .....	.95	2
Fred W. Cindel	3-30-44	Assembler .....	.95	2
Robert O. Shepard	3-31-44	Radial Drill Operator .....	.95	2
William R. Daubenberger	4-3-44	Buffer and Polisher .....	.90	2
Edwin C. Still	4-3-44	Buffer and Polisher .....	.90	1
Frank L. Zamfino	4-3-44	Grinder	1.00	2

(Testimony of Emmett J. Sullivan.)

Board's Exhibit No. 4—(Continued)

Name	Date Hired	Classification	Rate	Plant
William J. Blankenship	4- 3-44	Assembler .....	.95	2
Louis Hamlin	4- 3-44	Machinist	1.25	1
Acie Bratton	4- 3-44	Radial Drill Operator .....	.95	2
Walter H. Chamdler	4- 5-44	Test Mechanic	1.10	2
Earl R. Warne	4- 6-44	Radial Drill Operator .....	.90	2
Carmen Shandra	4- 7-44	Metalizer .....	.95	2
Bascom Griffin*	4-10-44	Boring Mill Operator	1.20	2
Angelina Griffin*	4-10-44	Internal Grinder .....	.95	2
Abe Smith	4-10-44	Niteriding Machinist .....	.85	2
Alfred R. Vallory	4-11-44	Radial Drill Operator .....	.90	2
Walton H. Cobb	4-12-44	Sub-Assembler .....	.85	2
Blaine H. Vlier, Jr.	4-12-44	Sub-Assembler .....	.90	2
Stanley W. Farrar	4-12-44	Niteriding Machinist .....	.90	2
Chas. W. Cole	4-12-44	Radial Drill Operator .....	.90	2
John Matteo	4-12-44	External Grinder	1.20	2
Wallis W. Nicholls	4-13-44	Tool Room Foreman	1.50	2
Harry R. Bryan	4-13-44	Sub-Assembler .....	.85	2
Joe Arell*	4-13-44	Internal Grinder	1.00	2
Russell R. McKowin	4-14-44	Surface Grinder	1.15	1
Lee Jay Casler	4-17-44	Radial Drill Operator .....	.95	2
Oscar M. Annis	4-20-44	Assembly Wash-up Man .....	.85	2

* Rehired—Returned from leave of absence.

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 5-A

PERSONNEL SUMMARY AS OF JULY 31, 1943

		Male	Female
Employees Shop #1.....	228		
Employees Shop #2.....	164	Hirings	22 10
Employees Office #1.....	115	Quits	12 3
Employees Office #2.....	44	Discharges	5 1
	—	Lay-offs	0 1
Total Employees	551	Leaves of Absence	3 2
		Military Separa-	
Productive Employees		tions	0
Shop #1	178	Deceased	1
Productive Employees			
Shop #2	98	Non-Productive Em-	
	—	ployees Shop #1.....	49
Total Productive	276	Non-Productive Em-	
		ployees Shop #2.....	67
Total Male Employees...	413	Non-Productive Em-	
Total Female Employees	138	ployees Office #1.....	115
Physically Handicapped	11	Non-Productive Em-	
Aliens	6	ployees Office #2.....	44
Negroes	0		—
Minors	1	Total Non-Productive	
Entered Armed Services..	0	Employees	275
Productive Males	240	Non-Productive Males ...	173
Productive Females	36	Non-Productive Females..	102
	—		—
Total Productive	276	Total Non-Productive ...	275

LABOR TURNOVER RATE..... 7.3%

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 5-B

PERSONNEL SUMMARY AS OF AUGUST 31, 1943

		Male	Female
Employees Shop #1.....	212		
Employees Shop #2.....	186	Hirings	32 11
Employees Office #1.....	106	Quits	28 14
Employees Office #2.....	42	Discharges	5 0
	—	Lay-offs	1 1
Total Employees	546	Leaves of Absence	3 1
		Military Separa-	
Productive Employees		tions	2
Shop #1	132	Others	0
Productive Employees			
Shop #2	74	Non-Productive Em-	
	—	ployees Shop #1.....	80
Total Productive	206	Non-Productive Em-	
		ployees Shop #2.....	112
Total Male Employees ...	418	Non-Productive Em-	
Total Female Employees	128	ployees Office #1	106
Physically Handicapped	11	Non-Productive Em-	
Aliens	6	ployees Office #2	42
Negroes	0		—
Minors	1	Total Non-Productive	
Entered Armed Services	2	Employees	340
Productive Males	180	Non-Productive Males	238
Productive Females	26	Non-Productive Females ..	102
	—		—
Total Productive	206	Total Non-Productive	340

LABOR TURNOVER RATE..... 11.4%

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 5-C

PERSONNEL SUMMARY AS OF SEPTEMBER 30, 1943

Employees Shop 1	216					Male	Female
Employees Shop 2	210						
Employees Office 1	103						
Employees Office 2	39						
	—						
Total Employees	568						
Productive Employees							
Shop 1	126	Shop 2	294				
Non-Productive Employees							
Shop 1	90	Shop 2	116	Offices	142		
Productive Males					184		
Productive Females					30		
Total					214		
Non-productive Males					255		
Non-Productive Females					99		
Total					354		
Hirings					63	16	
Quits					24	9	
Discharges					3	1	
Lay-offs					1	1	
Leaves of absence					4	2	
Military Separa-							
tions					4	1	
Others					1	0	
Total Male Employees....					439		
Total Female Employees					129		
Physically Handicapped..					11		
Aliens					6		
Foreign Born					42		
Negroes					0		
Minors					1		
Rehired—Male					5		
Rehired—Female					2		
Current Month Total.....					568		
Preceeding Month Total..					540		
Gain					28		

LABOR TURNOVER..... 10.5%

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 5-D

PERSONNEL SUMMARY AS OF OCTOBER 31, 1943

		Male Female	
Employees Shop 1	206		
Employees Shop 2	240	New Hires	38 17
Employees Office 1	100	Rehires	6 3
Employees Office 2	39	Quits	10 11
		Discharges	5 0
Total Employees	585	Lay-offs	7 0
		Leaves of Absence	5 1
Productive Employees		Military Separa-	
Shop 1 114 Shop 2 124		tions	7 0
		Others	1 0
Non-Productive Employees		Total Male Employees...	451
Shop 1 Shop 2 Offices		Total Female Employees	134
93 116 139		Physically Hanicapped	12
		Aliens	6
Productive Males	200	Foreign Born	47
Productive Females	32	Negroes	0
		Minors	1
Total.....	232		
Non-Productive Males	251	Current Month Total.....	585
Non-Productive Females	102	Preceeding Month Total..	568
Total.....	353	Gain.....	17

LABOR TURNOVER RATE..... 8.5%

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 5-E

PERSONNEL SUMMARY AS OF NOVEMBER 30, 1943

			Male	Female
Employees Shop 1	198			
Employees Shop 2	290	New Hires	47	16
Employees Office 1	97	Rehires	6	0
Employees Office 2	41	Quits	8	10
	—	Discharges	3	0
Total Employees	626	Lay-offs	9	0
		Leaves of absence	2	0
Productive Employees		Military Separa-		
Shop 1 124 Shop 2 149		tions	3	0
		Others	0	0
Non-Productive Employees				
Shop 1 Shop 2 Offices		Total Male Employees	487	
74 141 138		Total Female Employees	139	
		Physically Handicapped	14	
Productive Males	233	Aliens	5	
Productive Females	40	Foreign Born	47	
	—	Negroes	0	
Total.....	273	Minors	1	
Non-Productive Males	254	Current Month Total.....	626	
Non-Productive Females	99	Preceding Month Total..	585	
	—			
Total.....	353	Gain.....	41	

LABOR TURNOVER RATE..... 8%

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 5-F

PERSONNEL SUMMARY AS OF DECEMBER 31, 1943

				Male	Female
Employees Shop 1	201				
Employees Shop 2	337	New Hirings	57	15	
Employees Office 1	104	Rehires	4	5	
Employees Office 2	36	Quits	18	8	
	—	Discharges	10	0	
Total Employees	678	Lay-offs	0	0	
		Leaves of Absence	2	0	
Productive Employees		Military Sapara-			
Shop 1 124 Shop 2 191		tions	0	0	
		Others	0	0	
Non-Productive Employees					
Shop 1 Shop 2 Offices		Total Male Employees....	526		
77 146 140		Total Female Employees	152		
		Physically Handicapped	14		
Productive Males	267	Aliens	5		
Productive Females	48	Foreign Born	53		
	—	Negroes	0		
Total.....	315	Minors	0		
Non-Productive Males	259	Current Month Total	678		
Non-Productive Females	104	Preceding Month Total....	626		
	—				
Total.....	365	Gain.....	52		

LABOR TURNOVER RATE..... 6.2%

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 5-G

PERSONNEL SUMMARY AS OF JANUARY 31, 1944

				Male	Female
Employees Shop 1	188				
Employees Shop 2	344	New Hires	62	17	
Employees Office 1	103	Rehires	4	2	
Employees Office 2	43	Quits	31	9	
	—	Discharges	7	3	
Total Employees	678	Lay-offs	0	1	
		Leaves of Absence	2	2	
Productive Employees		Military Separa-			
Shop 1 121 Shop 2 209		tions	5	0	
		Others	0	0	
Non-Productive Employees					
Shop 1 67 Shop 2 135 Offices 146		Total Male Employees....	530		
		Total Female Employees	148		
Productive Males	280	Physically Handicapped	14		
Productive Females	50	Aliens	7		
	—	Foreign Born	57		
Total Productive	330	Negroes	0		
		Minors	0		
Non-Productive Males	250	Veterans	18		
Non-Productive Females 98					
	—	Current Month Total....	678		
Total Non-Productive	348	Preceeding Month Total..	652		
		Gain.....	26		

LABOR TURNOVER RATE..... 10.9%

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 5-H

PERSONNEL SUMMARY AS OF FEBRUARY 29, 1944

Employees Shop 1	185				Male	Female
Employees Shop 2	381			New Hires	73	20
Employees Office 1	105			Rehires	4	2
Employees Office 2	47			Quits	31	7
	—			Discharges	8	0
Total Employees	718			Lay-offs	5	1
				Leaves of Absence	0	1
Productive Employees				Military Separa-		
Shop 1 120 Shop 2 234				tions	2	0
				Others	0	0
Non-Productive Employees				Total Male Employees....	557	
Shop 1 Shop 2 Offices				Total Female Employees	161	
65 147 152				Physically Handicapped	12	
				Aliens	8	
Productive Males	294			Foreign Born	65	
Productive Females	60			Negroes	0	
	—			Minors	1	
Total Productive	354			Veterans	27	
Non-Productive Males	263			Current Month Total	718	
Non-Productive Females	101			Preceeding Month Total..	678	
	—					
Total Non-Productive	364			Gain.....	50	

LABOR TURNOVER RATE..... 8.5%

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 5-I

PERSONNEL SUMMARY AS OF MARCH 31, 1944

			Male	Female
Employees Shop 1	190			
Employees Shop 2	430	New Hires	90	29
Employees Office 1	106	Rehires	7	1
Employees Office 2	51	Quits	36	12
		Discharges	9	1
Total Employees	777	Lay-offs	2	0
		Leaves of Absence	3	5
Productive Employees		Military Separa-		
Shop 1 124 Shop 2 268		tions	3	1
		Others	0	0
Non-Productive Employees				
Shop 1 Shop 2 Offices		Total Male Employees....	606	
66 162 157		Total Female Employees	171	
		Physically Handicapped	13	
Productive Males	326	Aliens	9	
Productive Females	66	Foreign Born	73	
		Minors	6	
Total Productive	392	Negroes	0	
		Veterans	36	
Non-Productive Males	280			
Non-Productive Females	105		Male	Female
		Total Accessions	97	30
Total Non-Productive	385	Total Terminations	49	19
Current Month Total	777			
Preceeding Month Total	718			
		Gain.....	59	

LABOR TURNOVER RATE..... 9.6%

(Testimony of Emmett J. Sullivan.)

BOARD'S EXHIBIT No. 5-J

PERSONNEL SUMMARY AS OF APRIL 30, 1944

			Male	Female
Employees Shop 1	199			
Employees Shop 2	450	New Hires	67	27
Employees Office 1	102	Rehires	5	3
Employees Office 2	50	Quits	46	12
	—	Discharges	7	2
Total.....	801	Lay-offs	0	0
		Leaves of Absence	6	2
Productive Employees		Military Separa-		
Shop 1 128 Shop 2 275		tions	3	0
		Others	0	0
Non-Productive Employees				
Shop 1 Shop 2 Offices				
71 175 152		Total Male Employees....	615	
		Total Female Employees	186	
Productive Males	324	Physically Handicapped	13	
Productive Females	75	Aliens	9	
Non-Productive Males ...	291	Foreign Born	73	
Non-Productive Females	111	Minors	3	
		Negroes	0	
Current Month Total	801	Veterans	37	
Preceding Month Total	777			
	—	Total Accessions	102	
Gain.....	24	Total Terminations	78	

LABOR TURNOVER RATE..... 10.2%

Q. (By Mr. Esterman): Mr. Sullivan, in your capacity as personnel director it was one of your duties, was it not, to see that in connection with the company's efforts to obtain help, from time to time, that certain advertisements were placed in newspapers under help wanted classifications, isn't that correct?

A. Yes, sir.

(Testimony of Emmett J. Sullivan.)

Q. Can you say, from your own recollection, when the company commenced, if you know, to advertise for help in the papers? Or if they were doing so when you came with them, say so.

A. Yes, sir, they were; and I continued it.

Q. You continued it?

A. Yes, from time to time.

Q. Is it or is it not a fact that the company has continuously, since you have been with the company, advertised for help in the various Valley papers in the Southern [58] California area?

A. Yes. There were certain periods where we cancelled all ads due to having an adequate number for the present work.

Q. What periods do you refer to?

A. I can't state just offhand. There were periods of several weeks where we had enough people or where we had some bugs in the tooling to iron out, where we didn't do any advertising.

Q. Well, what is your recollection as to the last time you brought about such cancellation, when was the last time you cancelled ads?

A. We cancelled ads—the last time when I changed my office and put another man in the hiring capacity he cancelled all advertising for a period of a week or ten days, before he started running any more at all.

Q. You mean by that that about six weeks ago, when you became industrial relations manager,—

A. That is correct.

(Testimony of Emmett J. Sullivan.)

Q. —at that time you instructed him to cancel all ads for a week or so?

A. I didn't actually instruct him. He was instructed by the manager of manufacturing.

Q. Do you know, in fact, whether the ads were cancelled?

A. I just understood we weren't running any more ads for a period of time. [59]

Q. Now, are you able to state, from your recollection, any other times when such cancellations were effected or ordered by or through you prior to that time?

A. I used my own discretion on that. I would cancel out ads for various classifications. We always had ads running for engineers, research and mechanical engineers. We had ads running continuously for those people. But for other groups of people it was spasmodic, run some and then we would quit running.

Q. You have, from time to time, advertised for machinists, have you not, for both shifts and both plants?

A. Machine operators mostly.

Q. Well, I asked you about machinists.

A. We might have had the word "machinist" in some of them.

Q. Do you distinguish between machinist and machine operator?

A. Oh, yes.

Q. Would you indicate what the distinction is?

A. A machine operator operates various types of machine tools. Usually he is one kind of an operator. He is an engine lathe operator or turret

(Testimony of Emmett J. Sullivan.)

lathe operator or a milling machine operator and knows nothing about the other machines. Whereas, a machinist, as such, should be able to operate various machines and set them up. It is a high class, it is on a par with toolmakers.

Q. You advertised for machine operators and you didn't [60] specify any particular machines; did you?

A. Yes, we did, in a good many instances. Usually the Bullard operators, we always mentioned that. If we advertised for Bullard operators we would use that name.

Q. You are not saying, are you, in every instance where you advertised for machine operators you mentioned the machine you wanted the person for?

A. Not in every instance.

Q. You did in some instances advertise for machine operators?

A. Yes.

Q. Isn't it a fact if a machinist applied, in response to a job for machine operator, you wouldn't turn him away?

Mr. Collins: I object to that as calling for a conclusion of the witness. It depends on the circumstances of the occasion. You might have to have somebody for some time and might not have to have them for another.

Mr. Esterman: I will withdraw the question.

Q. (By Mr. Esterman): A machinist is a machine operator; is he not?

A. He must know how to operate machines. He

(Testimony of Emmett J. Sullivan.)

could be a bench machinist and wouldn't do any machine operating.

Q. Isn't the distinction you made—and I am trying to understand it the way you stated—between machine operator and machinist, is a machinist is apt to be qualified to [61] operate more machines than a machine operator?

A. That is correct.

Q. A fellow that works on a particular machine, let's say, a lathe, could be a machine operator in that sense and yet not know anything about the other equipment?

A. That is right.

Q. Or he might know how to operate several machines; isn't that right?

A. If he operated more than two or three he would call himself a machinist so he could get the rate.

Q. I will accept that. I take it, from your statements, that in your experience, at least, it is harder to get machinists, as you have described them, than it is a machine operator?

A. Yes.

Q. Now, a milling machine operator is a designation, is it not, for one kind of machine operator?

A. That is right.

Q. I will ask you this, Mr. Sullivan: In your capacity as personnel manager wasn't it part of your job and part of your duties either to ascertain or to have ascertained on behalf of the company the particular skills and qualifications of the persons who came to the plant, so they might be best fitted

(Testimony of Emmett J. Sullivan.)

to the production needs and requirements of the company? [62]

A. That was usually obtained in an interview, final interview between the prospective employee, and in many cases, the superintendent or the night foreman or one of the top supervisory people. We would let them in to talk to their people, in many cases.

Q. It is one of the principal functions of the personnel department; is it not?

A. That is correct.

Q. Will you refer, Mr. Sullivan, to your personnel file on Mr. James Davis, and at the same time refer to your replacement schedule data with respect to the same worker, James M. Davis, and see if you can find any record of an occupational certification issued by the company on or about the first week in August, 1943, or any record relating to that subject on or about that date?

A. James M. Davis is listed on our replacement schedule as a toolmaker.

Q. Well, now, going on from there, do you have any records which show when and under what conditions you made requests for deferments with respect to Mr. Davis, with the Selective Service?

A. We requested more than six months' deferment for him.

Q. When did you first make such a request? Do your records show that? Do your records show any of the requests for deferments on the dates?

(Testimony of Emmett J. Sullivan.)

A. This is the last replacement schedule as of last December. It goes in every six month. I didn't bring the one before this with me.

Mr. Esterman: May we go off the record a moment, Mr. Examiner?

Trial Examiner Spencer: Yes.

(Discussion off the record.)

Trial Examiner Spencer: On the record.

Mr. Esterman: I am going to ask the company if they will stipulate to the following matters:—There are three—first, if it is not a fact that on or about August 5, 1943, the company, in a form entitled “Selective Service System Occupational Certification”, and signed by Mr. Sullivan, the witness, did not advise local board 550, Midland, Texas, that Mr. James M. Davis was on that date employed by the company as a toolmaker and grinder; that further, in response to the question, “Give a brief description of his duties”, the company filled in the following, over the signature of Mr. Sullivan: “Specializes in the constructon of repair, maintenance and calibration of machine shop tools, jigs, fixtures and instruments”;

Second, I will ask the company to stipulate if it is not a fact that on or about November 8, 1943, the company, by Mr. Sullivan, the witness, as personnel manager, in a document, signed by him and acknowledged and sworn to by him [64] did advise the same board, which I have just described, that in a selective service system affidavit, relating to

(Testimony of Emmett J. Sullivan.)

the occupational classification of Mr. James M. Davis, that the title of his job on that date was toolmaker; that the duties actually performed by him were as follows: "Specializes in the construction, repair, maintenance and calibration of machine shop tools, jigs, fixtures, and instruments, operating various machine tools and performing other highly skilled work such as laying out work, fitting and assembling parts."

And further, continuing with the same affidavit, that the company stated that the average weekly rate of pay for Mr. Davis was \$1.15 an hour. And in response to the question, "How long will it take to replace this employee" the company answered "More than six months."

And in response to the question "What specific steps have been taken to secure or train a replacement for this registrant" the company replied "Replaceable only out of industry."

Third, I will ask the company to stipulate if it is not a fact that on January 1, 1944, in a certification similar to the ones I have just described, to the same draft board 550, in Midland, Texas, the company did not, in fact, certify, with the approval of the Army Air Corps, that Davis on that date was a toolmaker; that occupational deferment was being [65] requested "In accordance with an attached Selective Service form (42A); that the actual duties performed by Davis were as follows:

"Specializes in the construction, repair, main-

(Testimony of Emmett J. Sullivan.)

tenance and calibration of machine shop tools, jigs, fixtures, and instruments operating various machine tools and performing other highly skilled work such as laying out work, fitting and assembling parts.”

Further, that Davis’ pay rate on that date, January 5, 1944, was \$1.15; that Davis could be replaced only out of industry; and further, it would take six months to replace him.

I have completed my request for stipulation, and I will add this statement: That the date which I have just read into the record was gathered by me personally, counsel for the board, from the original sources, and that if counsel will not stipulate to the accuracy of that —

Mr. Collins: Wait a minute. I have talked to Mr. Sullivan since you read those things, and we will stipulate to it. He hasn’t, of course, any definite recollection on it, but he says substantially that he recalls signing it. I will stipulate to the fact. I reserve my objection on the ground it is incompetent, irrelevant, and immaterial.

Mr. Esterman: I take that to mean, Mr. Collins, —correct me if I am wrong—you don’t question the authen- [66] ticity of the information? [67]

Mr. Esterman: I will ask the company at this time if they won’t stipulate that on Thursday, March 9, 1944, the company did not, in fact, advertise in the Valley Times, which is a paper published for general circulation, in what we call the San Fer-

(Testimony of Emmett J. Sullivan.)

nando Valley area; and that the advertisement in that paper and on that date was as follows:

“Machine operators, inspectors, engine assembly men, 60-hour week, Kinner Motors, Inc., 635 West Colorado, Glendale, availability certificate required”?

Mr. Collins: I won't stipulate to that, Mr. Examiner. I have discussed this stipulation with counsel. I will stipulate that the ad was in there, but the true facts, as I am sure the evidence will show here, is that sometimes [69] these ads were run after they were told to be stopped and sometimes subordinates were told to stop them and they didn't do it until the next issue. I don't think the matter has any relevancy. As I told counsel, if he has the paper I will stipulate the ad appeared that day. I certainly won't stipulate that under all the circumstances of how they kept these ads going back and forth, sometimes, you know, you send in a cancellation and they don't check it or some subordinate has been told to cancel —

Trial Examiner Spencer: As I understand, you are only asking counsel to stipulate that advertisement appeared in this periodical, as stated, on a certain date?

Mr. Esterman: That is right.

Mr. Collins: That is correct. I didn't understand him to say that. [70]

ALBERT SWANSON,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Esterman): Your name is Albert Swanson? A. Yes, sir.

Q. Will you please talk up so I can hear you? [79]

A. Yes, sir.

Q. That is better. Where do you live, Mr. Swanson? A. 3087 North Fair Oaks, Altadena.

Q. Where do you work, Mr. Swanson?

A. Standard Machine Works, 88 De Lacey, in Pasadena; North De Lacey.

Q. Pasadena? A. That is right.

Q. What work do you do there?

A. Toolmaker and jig designer, all-around machinist, I believe, is more proper.

Q. All-around machinist is what you said?

A. Yes.

Q. Thank you. Before you worked for Standard Machine Works you were employed, were you not, by Kinner Motors in Glendale? A. Yes, sir.

Q. Over what period were you so employed by Kinners?

A. On or about the 16th of November, 1942.

Q. Until?

A. Until on or about the 18th of January, 1944.

Q. When you worked for Kinner's did you work in any particular plant? A. Yes; plant 2.

(Testimony of Albert Swanson.)

Q. What work did you do when you were there?

[80]

A. Inspection.

Q. Did you work on one shift all the time?

A. No.

Q. What was the situation?

A. Day shift to about the 7th of October, 1943.

Q. What happened then?

A. Then I was transferred over or I was asked to go on the night shift as an inspector.

Q. Someone in the company asked you if you would? A. Yes.

Q. And you went? A. Yes.

Q. From then until you left you were employed in Plant 2 on the night shift?

A. That is right.

Q. From October, 1943, until January, 1944; is that correct? A. Yes, sir.

Q. Now, did you know a gentleman named Howard Sharrar? A. Yes, sir.

Q. S-h-a-r-r-a-r? I think that is right.

A. I don't think so.

Mr. Esterman: Is that incorrect, Mr. Sullivan?

Mr. Sullivan: Sir?

Trial Examiner Spencer: Is that spelling incorrect?

Mr. Sullivan: No. [81]

Mr. Esterman: Thank you.

Trial Examiner Spencer: Now, what was the answer to the question?

(The record was read.)

(Testimony of Albert Swanson.)

Q. (By Mr. Esterman): At the time you went on nights what was Mr. Sharrar doing? He was employed by the company?

A. He was employed by the company.

Q. What was he doing at the time you went on nights?

A. As far as I know he was a head man or assistant foreman in the toolroom.

Q. At that time? A. At that time.

Q. Was his position changed at any time afterwards?

A. At the same night as I went on afternoons he became the night superintendent on the night shift.

Q. That was some time ——

Trial Examiner Spencer: Just a minute. I don't understand.

Mr. Esterman: I was about to ask the witness.

The Witness: The swing shift.

Q. (By Mr. Esterman): When you talk about going on afternoons, you are referring to the swing shift; are you not? A. Yes.

Q. Which starts at around 6:00 p. m.?

A. That is right. [82]

Q. And that is what you mean by going on afternoons.

A. Going on afternoons to the swing shift, I guess they call it.

Q. As distinguished from the day shift that starts when, if you know?

A. The day shift is 7:00 o'clock in the morning?

Q. Until?

(Testimony of Albert Swanson.)

A. Until 5:30, at the time I was there, and then the afternoon swing shift starts at 5:30, until 3:30.

Q. Of the morning of the next day?

A. Yes.

Q. That is what you meant by afternoon?

A. Yes.

Trial Examiner Spencer: Mr. Sharrar was what at the time you went on the afternoon?

The Witness: He was the night superintendent.

Q. (By Mr. Esterman): At or about the time you were switched he became the night superintendent, is that what you said? A. Yes, sir.

Q. Thank you. During the course of your work on that shift, and during the period between October and the time you left in January of this year, did you have occasion to talk with Mr. Sharrar at different times? A. Yes, sir.

Q. Did you see a good deal of each other during [83] that period? A. Yes; every night.

Q. You talked with him pretty frequently; did you? A. That is right.

Q. Did you become friendly with him?

A. Quite friendly.

Q. Now, I call your attention to the fact that there was a hearing before the Labor Board in connection with a case involving Kinner Motors, this company, held here in Los Angeles on four successive dates, December 13, 15, 16 and 17, 1943. I am calling your attention to that and asking you to have that date in mind. That hearing, as I just indicated, was concluded on the 17th of December, 1943.

(Testimony of Albert Swanson.)

Now, with respect to that period between December 17, 1943, and the time you terminated, January 18, 1944, did you have any conversations with Mr. Sharrar on the subject of the Labor Board hearing?

A. Not directly. He expressed himself that he was very—well, in the words he was quite fatigued and that it was a little bit too much for him to attend to the hearing and also new on the job.

Q. You are telling us what he said about the hearing? A. Yes.

Q. I see. Well, did you have any discussions about the hearing itself?

A. Not directly, no. [84]

Q. Well, what do you mean by “not directly”?

A. What I mean is this: That we didn’t discuss the hearing, what they were doing at the hearing, what was going on at the hearing; just that he had been at the hearing and he was tired.

Q. That is what you meant by “indirectly”?

A. Yes.

Q. By not directly? A. Yes, that is right.

Q. Did you have any conversations with him during that period on the subject of unions?

A. Yes.

Q. Did you have more than one such conversation? A. About twice.

Q. Where was each conversation had, if you recall?

A. At his office or in Mr.—the office of the day superintendent.

(Testimony of Albert Swanson.)

Q. Was anyone else present at these conversations you are telling me about?

A. No, there wasn't.

Q. Just you and Sharrar?

A. That is right.

Q. I am asking you only to tell us what conversation on the subject of union you had. Do you understand that? A. No. [85]

Q. Will you tell us what was said by him and what was said by you in those conversations?

A. Well, he said to me that the A. F. of L. union wanted to get in and organize the Kinner Motors, the employees, and he thought it was insufficient as long as we had an association in the shop. So he didn't see the necessity of having the A. F. of L. organize in the Kinner's. He was very much opposed to the A. F. of L. activity in Kinner's.

Q. Is that what he said?

A. That is what he said.

Q. Was there any discussion of A. F. of L. men in the shop between you and Mr. Sharrar?

A. Yes. He said that there was one or two in the shop that were quite active in the A. F. of L. organization, and he didn't quite like the idea of having the men try to organize the A. F. of L. in there.

Q. Did he say whether he would do anything about it or not?

A. No, he didn't. But I did. I said like this, I said, "Why don't you change the men over to less

(Testimony of Albert Swanson.)

pleasant work and probably you may induce them to quit?" [86]

Q. You said that to him?

A. I said that to him.

Trial Examiner Spencer: Did you say less pleasant work?

The Witness: Yes.

Q. (By Mr. Esterman): You said that to him?

A. Yes. I don't know if that is English or not.

Q. Go ahead and use your own language, Mr. Swanson. You don't have to be a lawyer to testify.

A. Then he said he didn't have authority to do so; and I believe that conversation ended at that time.

Q. In discussing these A. F. of L. men in the shop, did he mention any by name?

A. Yes, he mentioned Mr. Salter. He was quite active in the A. F. of L. And then at the same time he said that Salter did not attend to his work the way he should have, he didn't work steady. He took time off whenever he pleased and he wanted to dismiss him on that account. Also he said at times he was very active in the A. F. of L.

Q. Have you told us all you can remember now of your conversations with Mr. Sharrar on that subject? A. Yes, I have.

Q. Now, you are here, are you not, in response to a subpoena? A. Yes, I am. [87]

Q. Of what plant was Sharrar night foreman?

A. Plant 2.

Q. Plant 2? A. Yes.

(Testimony of Albert Swanson.)

Q. Was Mr. Salter working in Plant 2 at that time? A. Yes, he was.

Q. Were any other A. F. of L. men mentioned by name? A. No. [88]

LESLIE M. DAYHOFF,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Esterman): You are Mr. Leslie M. Dayoff? A. That is right.

Q. Where do you live, Mr. Dayhoff?

A. 7617 Santa Monica Boulevard.

Q. You are here in response to a subpoena; are you not? A. Yes, sir.

Q. You are employed by Kinner Motors at this time? A. Yes, sir.

Q. Glendale? A. Yes, sir.

Q. How long have you worked there?

A. Since about July, 1941.

Q. Has your employment with the company been continuous? A. All but about two weeks.

Q. What happened then?

A. I left the company for another job and stayed two [89] weeks, and come back again.

Q. Approximately when was that?

A. That was, I think that was around May, '42.

(Testimony of Leslie M. Dayhoff.)

I am not sure about that date, but it is right around in there.

Q. Now, what plant do you work in?

A. Plant 1.

Q. On what shift? A. Swing shift.

Q. Is that the night shift, what we call the night shift here? A. Yes.

Q. What work do you do? A. Machinist.

Q. Do you know whether or not you are an A machinist, B machinist or a C machinist?

A. Well, I don't know what I am rated at. I am a general all around machinist.

Q. Have you ever heard yourself referred to as an A or B or C machinist? A. I haven't, no.

Trial Examiner Spencer: What is your present rate of pay?

The Witness: \$1.30 is the rate, with a 5 cent bonus for nights.

Q. (By Mr. Esterman): Now, during the time, until February [90] of 1944, you were acquainted, were you not with Davis, Gilpin and Swope, who worked in the tool room on the night shift?

A. Yes, sir.

Q. You know they were terminated some time in February? A. Yes, sir.

Q. Were you working at the time they or any of them were terminated?

A. No, I was sick with the flu.

Q. For what period, if you recall, were you away from the plant?

(Testimony of Leslie M. Dayhoff.)

A. I think I was away from the plant from about February 5th to—no, February 17th to March 5th.

Q. About two weeks or thereabouts?

A. Somewhere around there. I think it was about fifteen to seventeen days; I am not sure.

Q. At any rate, you came back from an illness around the 5th of March; is that right?

A. Yes, sir.

Q. Did you learn that Davis, Gilpin and Swope had been terminated?

A. When I came back, yes sir.

Q. They weren't there and you found they had been discharged?

A. They weren't there and I heard that about the first [91] thing when I came back.

Q. Who was your foreman in March of 1944?

A. Brian Johnson.

Q. Is that Brian, B-r-i-a-n? A. Yes.

Q. Brian C. Johnson?

A. Brian C. Johnson, yes.

Q. What is he foreman of, if you know?

A. Machine shop.

Q. On the night shift?

A. On the night shift.

Q. Was he the foreman of the machine shop on the night shift when you were employed in July, 1941? A. Yes. [92]

Q. (By Mr. Esterman): When you came to work for the company in July, 1941, you testified you went into the machine shop on the night shift; is that right? A. That is right.

(Testimony of Leslie M. Dayhoff.)

Q. Did you report to anyone in particular when you were hired?

A. No, I went into the shop and reported in the shop, and Mr. Davey introduced me to Mr. Johnson and said he was the night foreman.

Q. Mr. Davey said Johnson was the night foreman? A. Yes.

Q. That was in July, 1941?

A. That was when I first went in.

Trial Examiner Spencer: Is that D-a-v-i-s?

Mr. Esterman: D-a-v-e-y.

Trial Examiner Spencer: Thank you.

Q. (By Mr. Esterman): At that time you understood Mr. Johnson was the night foreman of the machine shop? A. That is right.

Q. Did anything happen since then that caused you to change your mind or your understanding, so far as Mr. Johnson [93] is concerned?

A. You mean that he wasn't foreman?

Q. That is right. A. No, I don't think so.

Q. As far as you know he is still the foreman?

A. As far as I know he is. [94]

Q. (By Mr. Esterman): I think you said when you came back on or about March 5th, from your illness, you found that Davis, Gilpin and Swope had been discharged; is that correct?

A. Yes, that is correct.

Q. Calling your attention to the night of your return, that is, the first night you worked, —

A. Yes.

(Testimony of Leslie M. Dayhoff.)

Q. — did you have any conversation with Mr. Johnson about Davis, Gilpin and Swope?

A. Yes, I had a conversation with him; not very long one.

Q. I am just asking if you had one, and you say you did? A. Yes. [98]

Q. Where did you have that conversation?

A. Back toward the back end of the shop.

Q. Is that in Plant 1? A. Plant 1.

Q. That is after you came to work?

A. Yes, sir.

Q. Was anyone else present? A. No.

Q. What was the conversation?

A. Well, I asked him—I think I started the conversation. I think I asked him what he had heard or if he had heard anything about the—we referred to those boys as the Three Musketeers at that time.

Q. Whom did you mean by the Three Musketeers?

A. Davis, Swope and Mr. Gilpin. I asked him about whether he heard anything from them lately, and whether he thought they would get back to work.

Q. Did Johnson say something?

A. No. He says he hadn't heard anything about it. He said he didn't hardly think they would come back to work.

Q. Was anything else said at that time?

A. I think he said Mr. Sullivan came into the shop and wanted the boys to write an affidavit in regard to it. Of course, I wasn't there when that

(Testimony of Leslie M. Dayhoff.)

happened, but that is what he told me, at that conversation. [99]

Q. I am only asking you what was said by you or Mr. Johnson at that time. A. Yes.

Q. Have you recalled everything you can at this time?

A. Well, I think he told me about the affidavit that he wrote, he didn't tell me what he wrote, but he thought that what he did write done himself more harm than anybody else.

Q. I am concerned with the subject of Davis, Gilpin and Swope. Did you discuss those three gentlemen with Mr. Johnson at another time after you came back from our illness?

A. I think I did, yes.

Q. Approximately when was it, if you know?

A. Oh, probably a couple of weeks afterward. I couldn't recall just how soon.

Q. Approximately a couple of weeks after you returned? A. Yes.

Q. Was this conversation between you and Mr. Johnson in the same location?

A. Approximately in the same place.

Q. Plant 1? A. Yes.

Q. Was anyone else present? A. No, sir.

Q. What was the conversation?

A. Well, I can't recall just exactly. He said something [100] about he thought if these three fellows would have been let out in the right way, he thought there wouldn't have been so much trouble about it.

(Testimony of Leslie M. Dayhoff.)

Q. Did he tell you what he meant by the "right way"? A. Well, yes, in a way he did.

Q. You tell us what he said. If he explained that, tell us.

A. He said he thought if he had done it he would have given them some hard job they couldn't do, and they would have an excuse to let them go; or put them in the other plant and give them some kind of a job they couldn't master.

Q. (By Mr. Esterman): Tell us everything you recollect of that discussion.

A. That is about all of that conversation. He just told [101] me that he didn't think they were let out the right way.

Q. That is all you recall at this time?

A. That is all I recall, yes.

Q. When he told you he didn't think they were let out the right way, did he tell you why he thought so?

Mr. Collins: I object to that as leading and suggestive.

Trial Examiner Spencer: Overruled. Did he?

The Witness: What is it?

Trial Examiner Spencer: Read the question.

(The question was read.)

The Witness: Yes, he said when they let them out they went and took their time cards out, and when they came to work their time cards weren't there and the guards wouldn't let them in the shop without a guard following them.

(Testimony of Leslie M. Dayhoff.)

Q. Do you remember any more of that conversation?

A. No, I don't. I don't think there was very much more to it. [102]

Cross Examination

Q. Now, when you came back and you talked to Mr. Brian Johnson, isn't it a fact that these gentlemen, Mr. Davis and Mr. Swope and Mr. Gilpin had filed an application with the War Labor Board for reinstatement?

A. That I don't know. That is what I heard, they did do that. But I don't know.

Q. You spoke to Mr. Brian Johnson about it; didn't you?

A. No, I don't think so, not particular about them filing [107] an application.

Q. Don't you remember that you said something to him about that? Think back. Don't you recall you did?

A. No, sir.

Q. Do you remember that you had several talks with Mr. Brian Johnson about this?

Mr. Esterman: When?

Mr. Collins: Well, now, I can only ask the first question, and then find out when.

Q. (By Mr. Collins): You had several conversations?

A. Just a couple, yes.

Q. More than a couple; didn't you.

A. No, sir.

Q. Only a couple?

A. About two, I remember of. That is, when him and I was alone.

(Testimony of Leslie M. Dayhoff.)

Q. Did you have other conversations with Mr. Nichols?

A. I never had a conversation with Mr. Nichols.

Q. Did you have any conversation with Mr. Davey? A. Never.

Q. Now, in your conversations with Mr. Brian Johnson, did you tell him you wanted to tell him some things about these boys, that they didn't know at the time their contracts were terminated, but they must know now because of the difficulties that had occurred on the night shift through [108] some of the activities of these boys?

A. I don't quite understand what you mean.

Q. Didn't you tell Mr. Johnson you wanted to tell about some of the things he didn't know about, what those boys had been doing on the night shift?

A. No, sir.

Mr. Esterman: I am going to object unless counsel indicates when these conversations he is asking about took place.

Mr. Collins: These two conversations you questioned him about, and I am cross examining him about?

Trial Examiner Spencer: The witness has answered the question. The answer is no. It may remain on the record. Proceed.

Q. (By Mr. Collins): Didn't you tell him that there had been a great deal of confusion and a great deal of upset among the night employees because of the statements that these boys had been making

(Testimony of Leslie M. Dayhoff.)

to the night employees that they must not buy War Bonds?

A. There was quite a bit said about War Bonds, yes.

Q. Didn't you tell that to Mr. Brian Johnson?

A. Well, I told it to everybody as far as that is concerned; not particular with him alone, no.

Q. Didn't you tell him that production had lagged in the night shift and these boys must not be brought back after the statements they had made to the employees that the em- [109] ployees should not buy War Bonds?

A. I never said anything about production lagging.

Q. What did you say to him about the boys and the statements they had been making in the plant about not buying War Bonds?

Mr. Esterman: I object. The question assumes something not in evidence.

Mr. Collins: This is cross examination.

Mr. Esterman: I understand that.

Mr. Collins: I have a right, on cross examination, to lead him and to ask him any kind of a question I want to about a conversation.

Mr. Esterman: That is quite true. And I agree with counsel. However, I object to the particular question, as the question assumes a fact that is not in evidence; in fact, something which the witness has indicated that didn't happen.

Mr. Collins: I am trying to cross examine him and find out if it was said.

(Testimony of Leslie M. Dayhoff.)

Trial Examiner Spencer: All right. This can go on indefinitely. Pick up that question. I will hear the objection to the question. I am going to object to this continual exchange between counsel. I will hear you on an objection, and if opposing counsel wants to make a response, I will hear that, and then I want you to stop and I will make my ruling.

(The question was read.)

Trial Examiner Spencer: I will ask you this: Did you make any such statement to Johnson or anybody else?

The Witness: I have talked about the War Bond drive and talked about them to the boys.

Trial Examiner Spencer: Did you tell Johnson that?

The Witness: Well, I probably have. Probably I have, but I didn't talk to him direct in these two conversations. I talked to Johnson and everybody in the shop all along about things like that, but I am referring to the direct conversation I had with Johnson alone.

Q. (By Mr. Collins): All right. Let me ask you this: What did you tell Mr. Johnson or others about what these boys were doing about the War Bond drive?

A. Well, they were trying to discourage them.

Mr. Esterman: One moment. The witness was examined on two conversations with Mr. Johnson. Unless this purports to be cross examination on the same conversations, I am going to object. It is not

(Testimony of Leslie M. Dayhoff.)

related to anything we are concerned with in this hearing.

Mr. Collins: Oh, yes, it is related.

Trial Examiner Spencer: Just a minute.

Mr. Collins: I am sorry.

Trial Examiner Spencer: The witness has stated that in this conversation about War Bonds, relative to the [111] activities of these three employees, that his statements didn't occur in private conversations with Mr. Johnson. But he has testified that he has made some statements and I assume that Mr. Johnson may have been present when he made some of those statements.

Is that right?

The Witness: Probably so, yes.

Trial Examiner Spencer: Now, what do you want to get at here, counsel?

Mr. Collins: Here is the point: If the Trial Examiner please, counsel is making a point, or undoubtedly will make a point, or is attempting to make the point these boys, after the employment was terminated by reason of the close down of this particular phase of the business, this night shop crew were not taken back. I propose to show, not only by this witness, but by a good many witnesses, that subsequent—that when the investigation was made, or immediately afterward, when it was a question of their returning, something was disclosed never known to management, that these boys had created a real disturbance in this plant by a

(Testimony of Leslie M. Dayhoff.)

constant unpatriotic attempt to fight the War Bond drive in the plant.

Trial Examiner Spencer: Is that a part of your defense, a reason for refusing to reinstate them?

Mr. Collins: Yes.

Trial Examiner Spencer: We do not strictly limit [112] the cross examination to the scope of the direct. I will let you proceed.

Mr. Collins: All right.

Mr. Esterman: I also would like to add to my prior objection, which hasn't been ruled on, to the question now pending, that the question is vague and indefinite and absolutely not susceptible of an intelligent answer.

Trial Examiner Spencer: Rephrase the question. Get a new question and let's go ahead here.

Q. (By Mr. Collins): What did you say to Mr. Johnson or in the presence of Mr. Brian Johnson about the activities of these boys in connection with the sale of War Bonds?

A. Well, I said they were trying to discourage the War Bond sale, and I didn't believe in it myself.

Q. Did you tell him what they were telling the employees? A. How is that?

Q. Did you say, in that conversation, what these boys were actually saying to the employees about buying War Bonds?

A. They said they were spending their money foolishly, and the War Bonds would not materialize, nobody would ever get their money back from them.

(Testimony of Leslie M. Dayhoff.)

Q. How many times did you hear these boys say that?

Mr. Esterman: Just a moment.

Mr. Collins: I withdraw that.

Q. (By Mr. Collins): Did these boys say this to you? [113] A. Absolutely.

Mr. Esterman: I object on the ground "these boys" doesn't mean anything.

Trial Examiner Spencer: Let's get it more specific.

Mr. Collins: All right, Strike that answer to the other question.

Q. (By Mr. Collins): Did you hear Mr. Gilpin say that?

Mr. Esterman: I object on the ground that I want to know what he expects this witness to testify that Mr. Gilpin said.

Mr. Collins: Why, my goodness, this is cross examination.

Mr. Esterman: That doesn't mean anything.

Mr. Collins: He isn't my witness. How would I know what your witness is going to testify?

Trial Examiner Spencer: Let's cut out this wrangling. Now, did you hear Gilpin yourself say anything about the War Bond drive?

The Witness: No, I don't recollect anything.

Trial Examiner Spencer: Did you hear Swope say anything about it?

The Witness: Yes.

Trial Examiner Spencer: What did you hear him say?

(Testimony of Leslie M. Dayhoff.)

The Witness: About what I said before, that they said it was very foolish. [114]

Trial Examiner Spencer: Did he say any more than that, Swope?

The Witness: We had had arguments off and on about it.

Trial Examiner Spencer: Did you report that to Johnson or talk about it in Johnson's presence?

The Witness: I probably have, yes.

Trial Examiner Spencer: Did you hear Davis say anything about the purchase of War Bonds?

The Witness: Yes.

Trial Examiner Spencer: What did you hear him say?

The Witness: About the same thing.

Q. (By Mr. Collins): Did he say you wouldn't get your money back?

A. That is what he thought, yes, sir.

Mr. Esterman: Who?

The Witness: Davis.

Q. (By Mr. Collins): Did Mr. Swope say that?

A. Yes.

Q. Did he say it was foolish for any one to buy them? A. Yes.

Q. Did Davis say that? A. Yes, sir. [115]

Redirect Examination

Q. (By Mr. Esterman): Did you tell Mr. Johnson anything about your conversations with Davis about War Bonds?

A. I probably have talked to him about it; not

(Testimony of Leslie M. Dayhoff.)

direct. I don't think to him alone, but with the bunch around there; I have talked to all the men in the shop about it.

Q. By that you mean the subject of War Bonds came up during a discussion of several men; isn't that what you mean? A. Sure.

Q. Johnson may have been present?

A. Yes, sir.

Q. Did you ever discuss with Johnson in private, away from anyone else, the subject of War Bonds, so far as Davis [116] is concerned?

Mr. Collins: I object to that as leading and suggestive.

Trial Examiner Spencer: The objection is overruled.

Mr. Collins: Thoroughly gone over; not proper redirect examination.

Trial Examiner Spencer: I will take it.

The Witness: I don't remember I talked direct to him in private about War Bonds. I have talked about War Bonds so much there, I don't remember just exactly who I talked to about it alone.

Q. (By Mr. Esterman): Did you ever tell Johnson that Davis wouldn't buy War Bonds?

A. I don't know whether Davis has ever said he wouldn't buy any. I don't think I ever recollect of him saying he wouldn't buy any.

Q. Do you know whether Davis has, in fact, bought any War Bonds? A. I don't know.

Q. Do you know whether Gilpin has bought any War Bonds? A. I don't know.

(Testimony of Leslie M. Dayhoff.)

Q. Do you know whether Swope has bought any War Bonds? A. I don't know that. [117]

EDWARD R. HANDZEL,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Esterman): Your name is Edward R. Handzel? A. Yes.

Q. Speak up so these gentlemen can hear you, please. Where do you live, Mr. Handzel?

A. 6234 Ben Avenue, North Hollywood.

Q. You are now employed by Kinner Motors?

A. Yes.

Q. You have been there for how long?

A. Oh, approximately 21½ years.

Q. When did you start?

A. I started January 18, 1942, until the present date.

Q. Have you worked continuously for the company since that time? A. Yes.

Q. Have you been on one shift or more than one shift? A. I have been on more than one shift.

Q. Will you tell us briefly what your job history has been, so far as the shifts are concerned?

A. When I started to work in '42 I was working nights [120] then. doing internal grinding on bar-

(Testimony of Edward R. Handzel.)

rels, until June of '43 and the day man had to go to the hospital to be operated on, so I took over the day shift. I did work on days until January, the latter part of January '44.

Q. What happened then?

A. I worked a week in January, and then after that week I went back on days, and I believe it was in April I was asked to go back on nights for a week or two. And after—well, I did work a week nights, that time. They transferred me back to days, and just recently they asked me to work nights again for a week or two.

Q. That is what you are doing now.

A. Yes, sir.

Q. You are at present on the night shift?

A. Yes.

A. What work are you doing, Mr. Handzel?

A. Doing grinding.

Q. Tool grinding?

A. Production grinding.

Q. That is in the machine shop, Plant 1; is that correct? What is correct? I don't know.

A. Well, when I did work nights, the three times they asked me to work nights, it was all work in Plant 2.

Q. What I meant, Mr. Handzel, is where are you working now, what plant? [121]

A. Plant 2.

Q. Plant 2? A. For Plant 1.

Q. What do you mean by that?

(Testimony of Edward R. Handzel.)

A. Well, we are merely using Plant 2's machines to do work for Plant 1. It is Plant 1 work; we are more or less using their machinery there.

Trial Examiner Spencer: It is your testimony that at all times when you worked at nights you were working in Plant 2 for Plant No. 1.

A. That is right.

Q. (By Mr. Esterman): I think you just stated, Mr. Handzel, you spent one week on the night shift in 1944, January, 1944?

A. That is right.

Q. Now, you know and you knew at the time, did you not, that a hearing had been held in the middle of December before the National Labor Relations Board, in a matter involving Kinner Motors?

A. That is right.

Q. You knew that at that time?

A. That is right, yes.

Trial Examiner Spencer: Just to complete the record, may we have the Case number?

Mr. Esterman: 21-C-2307. I might say I do expect to offer some parts of the record before we conclude so the [122] identification will be complete.

Trial Examiner Spencer: Thank you.

Q. (By Mr. Esterman): When was the first time you went to the night shift, do you recall that?

A. It was the latter week of January of 1944.

Q. Is that the first time you went on the night shift?

A. The first time this year.

Q. I meant the first time in your employment?

A. The first time of my employment was January 18, 1942.

(Testimony of Edward R. Handzel.)

Q. Who was your boss then?

A. Mr. Johnson.

Q. Is that Brian C. Johnson?

A. That is right.

Q. When was the next time you went on this night shift? A. January of 1944.

Q. Under whose supervision did you work in January of 1944 on the night shift?

A. Well, I took it for granted it was Mr. Johnson.

Q. Who was in charge of the night shift, do you know? A. I guess it was Mr. Johnson.

Q. Did you report to anyone during that week in January in connection with your work?

A. No.

Q. You understand what I mean by "report"?

A. Well, while working in Plant 2 I guess the privilege [123] has been given to me to just come to my machine and get to work. But as far as anybody coming over to see whether or not I am working, it has never happened.

Q. So, as far as you know, who was in charge of the night shift in Plant 2?

A. At that time Howard was night superintendent.

Q. In Plant 2?

A. In Plant 2. I don't know his first name.

Q. So far as you know, who was in charge of the night shift in Plant 1? A. Brian Johnson.

Q. During that week in January —

(Testimony of Edward R. Handzel.)

Trial Examiner Spencer: Why do you say he was in charge of the night shift?

The Witness: Pardon?

Trial Examiner Spencer: Why do you say that Johnson was in charge of the night shift?

The Witness: Well, the first time I worked nights, if I had any trouble, why, I would always see Mr. Johnson. In fact, the only people that ever did give me orders there was Mr. Davey or Mr. Johnson. There have been times when I had a little difficulty with the day man and talked it over with Mr. Johnson.

Q. Now, during your week on the night shift in January, did you have occasion to go from Plant 2 to Plant 1 at any time? [124] A. Yes.

Q. What was the occasion?

A. Well, during my lunch period—I managed to have my lunch while during working hours, while the machine was running, and did have some time to spare, so I did go to Plant 1 to chat with the boys.

Q. That was during your lunch hour at night. And that would be about what time?

A. Well, let's see. I believe at that time I was going there around 10 o'clock.

Q. 10:00 P. M.? A. Yes.

Q. Now, during your visits to Plant 1, under those circumstances, did you engage in any conversation with Mr. Johnson about the Labor Board hearing held in December? A. Yes.

(Testimony of Edward R. Handzel.)

Q. Do you recall where this conversation took place. A. Yes.

Q. Where did it take place?

A. It took place in Plant 1, around the stairway leading to the Men's Room.

Q. Was anyone else present? A. No.

Q. Tell us the conversation.

Mr. Collins: What date, please? [125]

Q. (By Mr. Esterman): You stated that this conversation with Mr. Johnson was during the week in January of 1944, when you were on the night shift; isn't that right? A. That is right.

Q. And that was what part of January, do you know?

A. The latter part of January.

Q. You don't recall the dates?

A. Well, the exact date I couldn't say, but I think I could say it was the last week of January. The exact date I don't know.

Trial Examiner Spencer: You were on what shift, now, at the time of the conversation?

The Witness: I was on the night shift.

Q. (By Mr. Esterman): It was in January?

A. Yes.

Q. You did work on the night shift for about a week? A. Yes.

Q. It was during that week that you had this conversation with Johnson? A. Yes.

Q. Do you remember the day of the week?

A. No, I don't.

(Testimony of Edward R. Handzel.)

Q. About what time of night was it with respect to your lunch hour? Had you had your lunch?

A. Yes, I had had my lunch before I took my half hour off.

Q. Will you relate now your conversation with Mr. Johnson; [126] what he said and what you said?

A. I was over to see the boys in the tool room, and on the way out I happened to have a newspaper in my hand, the evening paper, and Johnson and I happened to be in the aisle.

He said, "How is it going, Ned?"

I said, "Oh, pretty good." I said, "By the way, Mr. Johnson, how did that hearing come out with the Kinner Union and the Labor Board?"

And he said, "Oh, I really don't know, but those—" Then he cussed—he said a few cussing words there—"those damn fools over in the tool room are just a bunch of trouble makers," and he don't see why in the world they want to cause the company the trouble they did. And if they didn't care to belong to the Kinner Union, well, they didn't have to cause the trouble of bringing it up to the Labor Board, that the company union was company dominated, or rather that the union was company dominated. Well, I didn't say anything.

He also added, "Those guys have been causing trouble here right along. There have been times when I did want to fool around in the tool room there and they kind of made it tough for me. They

(Testimony of Edward R. Handzel.)

had the day foreman to tell me to stay out," that is, out of the tool room.

Shortly after that, it so happens Jim Davis happened to come down the aisle and our conversation stopped there, [127] as far as this conversation about the union was concerned.

Q. When he said, "Those guys in the tool room," whom did you understand him to mean?

Mr. Collins: I object to that as calling for a conclusion of the witness.

Trial Examiner Spencer: Well, did he mention any names?

The Witness: No, he just mentioned the fellows in the tool room.

Q. (By Mr. Esterman): Who was working in the tool room at that time?

A. Gilpin, Davis and Swope.

Q. That is, James Davis?

A. James Davis.

Q. Lewis Gilpin?

A. Lewis Gilpin and Richard Swope.

Q. Are you acquainted with them?

A. Yes.

Q. Did you ever hear anyone refer to them as the Three Muskateers?

A. Oh, I did, but I couldn't say exactly who it was. I kind of didn't make nothing of it.

Q. You have heard them referred to as the Three Muskateers? A. Yes.

Q. By the way, you are here in response to a subpoena; [128] are you not? A. Yes.

(Testimony of Edward R. Handzel.)

Q. At that time, at the time of this conversation with Mr. Johnson, was there anyone else working in the tool room on the night shift, other than these three men you just mentioned? A. No.

Trial Examiner Spencer: Did their conversation take place in Plant No. 1 or Plant No. 2?

The Witness: It took place in Plant No. 1.

Trial Examiner Spencer: Are the men in the tool room in Plant No. 1 or Plant No. 2?

The Witness: In Plant No. 1.

Mr. Collins: Does the Examiner understand this man was working in Plant No. 2 and simply came over on his lunch hour?

Trial Examiner Spencer: I think I have that clearly in mind.

Mr. Collins: Mr. Johnson had no connection himself with the tool room?

The Witness: No, not that I know of.

Mr. Collins: Mr. Johnson had to do with the other branches of Plant No. 1?

The Witness: That is right.

Mr. Collins: That is all. [129]

ROY C. WALKER,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Q. (By Mr. Esterman): You are Roy C. Walker? A. Yes, sir.

Q. Where do you live, Mr. Walker?

A. 6931 Longridge Avenue, Van Nuys.

Q. Where do you work?

A. Kinner Motors, in Plant No. 1.

Q. What shift? A. Night shift.

Q. How long have you been with Kinner Motors?

A. I commenced to work there the last time in 1938, I believe.

Q. That is to say, you have been there continuously since 1938? A. Yes, sir.

Q. Had you worked there before?

A. With the exception of an operation.

Q. I beg your pardon?

A. With the exception of time off for an operation.

Q. When were you off for that?

A. I was off in '39.

Q. For about how long? [131]

A. Approximately two months.

Q. Had you worked for the company before 1938. A. Yes, sir.

Q. When?

A. I commenced to work for them the first time on the 4th day of April, 1934.

Q. And left when?

(Testimony of Roy C. Walker.)

A. In '35 sometime, there was a slack period.

Q. What is your work at present?

A. Well, I just do whatever they tell me.

Q. What kind of work do you do?

A. Machine shop work.

Q. Are you a machinist?

A. Well, I don't know whether I am or not.

Q. Do you work on machines? A. Yes, sir.

Q. What kind of machines?

A. I work on milling machines, drill presses of all types, shaper, lathe.

Q. Have you been working on those machines since you came with the company in 1938?

A. Yes, sir.

Q. Now, you were acquainted, were you not, with Lewis Gilpin, James Davis and Dick Swope?

A. Yes, sir. [132]

Q. When they worked for the company?

A. Yes, sir.

Q. You know that Swope was let out on February, on or about February 17th, and that Davis and Gilpin were discharged on or about the 24th. I should say that Swope was discharged on or about the 19th, and the other two on or about the 24th. You knew that; did you not?

A. I knew positively of Davis and Gilpin going. Swope just didn't happen to be there one night, is all I happen to know about that.

Q. I see. Now calling your attention to the night that Gilpin and Davis were discharged, the night of February 24th, I think it was—we have an exhibit

(Testimony of Roy C. Walker.)

here which shows exactly—according to Board's Exhibit 3 he was discharged on February 23rd. Calling your attention to the night they were discharged, did you go to work that night? A. Yes, sir.

Q. Did you see Davis and Gilpin at or about the time you came to work? A. Yes, sir.

Q. At or about that time did you have any conversation with Mr. Brian Johnson?

A. Yes, sir, I did.

Q. Where did you have this conversation?

A. Near the corner of the tool crib. [133]

Q. Was anyone else there? A. No, sir.

Q. Was anything said by you or Johnson on the subject of Davis and Gilpin leaving the company?

A. I said to Johnson, "What is going on here? Is Davis and Gilpin getting fired?"

And he said, "It looks like it."

Q. What were Davis and Gilpin doing at that time?

A. They were picking up their tools and putting them in the boxes and closing up the boxes and checking in their checks.

Q. They weren't with you and Johnson?

A. No, sir.

Q. Did Davis and Gilpin leave the plant then, so far as you know? A. Yes, sir.

Q. Did you later that evening discuss the subject of Gilpin and Davis with Johnson?

A. Yes.

Q. When was that, in relation to the time they

(Testimony of Roy C. Walker.)

left? Was it immediately after or later in the night or when?

A. I would say it would be anyway from 20 minutes to an hour after they had gone.

Q. Was anyone else present during that conversation?

A. Why, there was one of the fellows standing near, but [134] he didn't say anything at the time.

Q. Do you know who the fellow was?

A. Linkogle.

Q. Is he one of the men that works there?

A. Yes, sir.

Q. Did he take part in that conversation?

A. No, sir, he didn't.

Q. What was the conversation between you and Johnson at that time?

A. Well, I said to Mr. Johnson, I said, "I don't see why they couldn't have sent them over to the other shop, like they did the others."

He said, "Yes, they could have done that."

Q. I can't hear you. Talk up.

A. I said to Johnson, I said, "I don't see why they couldn't send them over to the other shop like they did the others."

He said, "Yes, they could have done that." He said, "The way they are getting them out of here is kind of weak." He said further that if Davey had come and said anything to him, he could have told him how to let them go, to not get back, and that he believed the company was paying them right then and didn't know it.

(Testimony of Roy C. Walker.)

Q. Have you told us now all you can recall of that conversation? A. Yes. [135]

Q. During the past year has the company sent men from Plant 1 to Plant 2? A. Yes, sir.

Q. You know that to be a fact?

A. Yes, sir.

Q. Now, you said that you have told us all you recall of that conversation. I will ask you whether you said that Mr. Johnson told you that he thought their being let out was kind of weak?

A. Yes, sir.

Q. Is that the language he used?

A. That is the very words he used.

Q. Did he tell you what he meant by that?

A. No, he didn't.

Q. Did you ask him what he meant?

A. No, sir.

Q. That is all you recall of that conversation at this time?

A. Well, he further stated that they could have let them go from the other shop.

Q. I can't hear you.

A. He further stated at that time they could have let them go from the other shop.

Q. Let them go from the other shop?

A. Yes, after they had been transferred there they [136] could have been let go from there.

Q. Mr. Johnson said that?

A. Mr. Johnson said that.

Q. Have you told us all you recall of that conversation? A. That is all I can recall.

(Testimony of Roy C. Walker.)

Q. Very well. You know, do you not, that there was a proceeding before the War Manpower Commission early in March, 1944, in connection with the discharge of these three men.

A. I knew there was something, I didn't know where, only it was to take place in Glendale, so far as I knew.

Q. You heard Mr. Collins mention that a few minutes ago; did you not? A. Yes, sir.

Q. Calling your attention to the first week of March, the early part of March, I will ask you if you had any conversation at that time, at or about that time, with Johnson on the same subject, that is, the subject of the discharge of Gilpin, Davis and Swope?

A. Well, I had some conversation with him one evening.

Q. Was it about that time?

A. Yes, it was just a little while before this hearing took place.

Q. You mean the Glendale hearing?

A. The Glendale hearing.

Q. Where did you have this conversation with Johnson? [137]

A. Back down by this tool box.

Q. Is that in Plant 1?

A. In Plant 1.

Q. What were the circumstances? Was anyone else there? How did it start?

A. Previous to the conversation with him, Mr.

(Testimony of Roy C. Walker.)

Sullivan had come in and he and Mr. Johnson stood by the corner of the tool room—I mean the tool crib, near the corner of the tool crib, and talked for quite awhile. So after Mr. Sullivan left, Johnson went down toward his tool box and I met him on the way. And I asked him what Sullivan wanted.

He said, “He wants me to make out a statement against those fellows.” He said, “That is what I am going to write out now.” He said, “That is the way they do things here. They wait and never tell you anything, just wait until they get in a jam and come to you and get you to help them out.”

Q. Did you say anything?

A. No, I don’t recall that I said anything to him.

Q. The statement you just recited was made by Mr. Johnson?

A. Made by Mr. Johnson.

Q. Was anyone else present when he made it?

A. No.

Q. Mr. Sullivan had left when he made it?

A. Mr. Sullivan had been gone for all of 10 minutes or more. [138]

Q. Is that all you recall of that conversation?

A. Yes, that is all there was to that conversation.

Q. Now, so far as you know, what is Mr. Johnson’s job with the company?

A. What is his job?

Q. Yes.

A. Well, so far as I know, he acts as a foreman.

Q. Do you know who he reports to?

A. He reports to Mr. Swanson.

Q. Who is Mr. Swanson?

(Testimony of Roy C. Walker.)

A. Mr. Swanson is the day foreman, so far as I know.

Q. Whom do you report to? A. When?

Q. Well, in connection with your work. Who is your superior?

A. Well, in the case that I come in of an evening, Mr. Swanson.

Q. You mean the day foreman?

A. He is always there, as a usual rule. If he is not there, one of his assistants is there as a usual thing. Of course, if they all happen to be gone, Johnson will designate the machine to work on. If Johnson is not there, should happen to come in late, which has occurred, some other employee will tell me where to go to work.

Q. Mr. Swanson doesn't stay there all night; does he? [139]

A. Oh, no, he stays there until we come on, as a usual rule.

Q. Then he leaves?

A. Yes, he leaves shortly afterwards. Of course, there is some nights he doesn't stay.

Trial Examiner Spencer: Do you know whether Johnson does any production work himself?

The Witness: Some times.

Trial Examiner Spencer: Do you work in a position where you observe Johnson throughout your shift?

The Witness: Well, if you mean am I in sight of him or where I can see what he is doing, I would

(Testimony of Roy C. Walker.)

say part of the time I can see what he is doing from where I am working.

Trial Examiner Spencer: What is your observation as to how much of his time he puts in in production work himself?

The Witness: Well, that would be just whatever Mr. Swanson would designate for him to do. If he didn't designate for him to do something, any particular night, why, he wouldn't do anything in the production line.

Mr. Esterman: I have no further questions.

Trial Examiner Spencer: Do you have any cross-examination, Mr. Collins? [140]

Redirect Examination

Q. (By Mr. Esterman): Since you have been with Kinner, have you ever heard of the job classification of junior toolmaker? A. No, sir.

Q. Has there been a man named Schultz on the night shift? A. Yes, at one time. [146]

Q. What is his name? A. Henry.

Q. Henry Schultz? A. Henry Schultz.

Q. Is he still on the night shift?

A. I believe at this present time he is working days in Plant No. 2.

Q. Was he at one time on the night shift?

A. He was at one time on the night shift, in Plant No. 1.

Q. When did he leave the night shift, if you know? A. I can't recall —

Q. I am not asking you for the date, Mr. Walker. I mean approximately.

(Testimony of Roy C. Walker.)

A. He left sometime last year, I believe.

Q. Where did he go from the night shift in Plant 1?

A. He went to the night shift in Plant No. 2.

Q. Did you see him there? A. Yes, sir.

Q. What work did he do in Plant 1?

A. He was a gish hole operator on cylinder barrels.

Q. Do you know what job he went to in Plant No. 2?

A. Only what I saw him doing. I saw him operating a grinder.

Q. In Plant 2? A. In Plant 2. [147]

Q. Was there an employee named Woodsford on the night shift while you have been with the company? A. Yes; there were two of them.

Q. Are they brothers? A. Yes.

Q. Do you know their first names?

A. Alfred and Harry. I believe it is Henry, instead of Harry.

Q. Are they still on the night shift?

A. Alfred is on the night shift in Plant No. 2. Harry, I believe, is on the day shift in Plant No. 2 at present.

Q. Did they both leave the night shift in Plant 1 at the same time. A. I believe they did.

Q. About when was that, if you recall?

A. I believe that was in 1942. I am not positive about that date.

Q. Where did Harry go?

A. Harry went to Plant No. 2.

(Testimony of Roy C. Walker.)

Q. On the night shift? A. Yes.

Q. Did you see him there? A. Yes.

Q. Working on the night shift?

A. Yes sir. [148]

Q. What about Alfred, did he go to the night shift? A. He went to the night shift, too.

Q. In Plant 2? A. Yes, sir.

Q. What work did these gentlemen do on the night shift in Plant 1 where your work is?

A. Harry worked on—at the time he left Harry worked on rear covers and crank cases, and front covers and smaller stuff. Alfred worked on rear covers, front covers, crank cases and crank shafts.

Q. With respect to these same two boys, do you know what work they did when they went over to Plant 2 on the night shift? Take them one at a time.

A. I don't know just exactly what Harry done when he first went over there. It wasn't long after he had been there until he was broken in on the thread grinder, and ground threads of the cylinder barrels.

Q. Did you see him doing that work?

A. Yes, sir.

Q. What about the brother?

A. The brother did a little tool work, that I know of. Then he was placed, as a lead man, over all the drill presses on the night shift.

Q. In Plant 2?

A. In Plant 2. That is what he is doing today.

[149]

(Testimony of Roy C. Walker.)

Trial Examiner Spencer: Is it Henry or Harry?

The Witness: I believe his name is correctly Henry, but everyone calls him Harry; his initials are H. J. Woodsford, I believe. [150]

LEO MUNKACHY,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Esterman): Will you state your name, and spell your last name, please?

A. Leo Munkachy; M-u-n-k-a-c-h-y.

Q. Where do you live, Mr. Munkachy?

A. 420 West Oak Street, Glendale.

Q. Please talk up so these gentlemen over here can hear you (indicating).

A. 420 West Oak Street, Glendale, California.

Q. Where are you employed?

Q. Kinner Motors.

Q. How long have you been employed by Kinner Motors?

A. Since the 29th of February; about three months.

Q. 1944? A. 1944.

Q. Before that, just prior to that, what did you do?

A. Well, the employment I had before that was

(Testimony of Leo Munkachy.)

in Cleveland, Ohio; Cleveland Graphite-Bronze Company. [151]

Q. How long were you with the Cleveland Company? A. A year and a half.

Q. According to Board's Exhibit 4, which is in this record, Mr. Munkachy, you were employed by the company on February 28, 1944. Is that substantially your recollection? Did you say the 28th or 29th?

A. No, the 29th. I reported on the 28th and started on the 29th.

Q. I see. Have you told us what work you did in Cleveland?

A. I was doing tool and die work at Cleveland Graphite.

Q. How much time did you spend there?

A. At Cleveland Graphite about a year and a half, approximately.

Q. Have you had any similar experience with tool work or grinding?

A. Yes, I was working at the Marrion Welding Company in Cleveland, in machine shop work.

Q. How much time did you spend there?

A. About four months, I imagine.

Q. Did you apply for work at Kinner's in February? A. Yes, I did.

Q. How did you come to apply there?

A. Well, I wanted to get back into the tool and die work, and I applied at Kinner Motors for that type of work.

(Testimony of Leo Munkachy.)

Q. I mean how did you happen to apply at Kinner's, [152] particularly?

A. At that time it was convenient for where I lived, not having a car for transportation.

Q. It was near your residence?

A. That is right.

Q. Now, when did you first go there?

A. About the 23rd of February, was the first—yes, that was the first time I went to that place.

Q. What happened on that day with respect to your trying to get a job at Kinner?

A. They told me what was open.

Q. Who told you what was open?

A. Mr. Sullivan.

Q. Did you see Mr. Sullivan personally?

A. He was interviewing me at that time. At that time there wasn't anything open in that line of work was the information I was given.

Q. What work did you ask for?

A. Wait a minute. I will take that back, on that statement there. At that time he told me what I could start for at a job at Kinner Motors.

Q. What did he tell you?

A. I could start in the tool room at Kinner Motors at \$1.05 an hour. That is, on nights, \$1.00, plus five, and I wanted to look around for other employment at that time, [153] being the first place I had gone to. I came back the following day and he told me that day that he didn't have openings, but, as I left the plant, I got in the car and left and when I arrived home that evening I found a letter

(Testimony of Leo Munkachy.)

stating it was all a mistake, that I should report in to work Monday night.

Q. After you got this letter marked Board's Exhibit 7, what did you do?

A. I waited until Monday and reported in ready for work, brought my tool box in. And at that time he told me the work I had to do and he apologized for——

Q. Just a moment. Now, when you said "he told me," please tell us who you mean?

A. Mr. Sullivan told me I would be hired as a toolmaker at Plant 1. And he also apologized for having made the mistake [154] in telling me there wasn't a job open on the previous date that I was there, that I received the letter. And that he even made the statement they practically run up the street trying to get me, but missed me.

Q. I would like to have you tell us, if you can, what date this happened. This is the date Mr. Sullivan told you he had given you the wrong information?

A. That was on Monday; that was the 28th.

Q. 28th of February? A. That is right.

Q. That was some days after you received the letter?

A. That was the date the letter told me to report in ready for work, the 28th of February, on Monday.

Q. What happened then after your talk with Mr. Sullivan?

A. I brought my tool box in and talked to him.

(Testimony of Leo Munkachy.)

I had some private business to take care of. I asked him if it would be all right to come in the following night, which was the 29th; and I started work.

Q. You did start on the following night?

A. 29th.

Q. Where did you start to work?

A. Well, when I arrived that night he told me that the position of toolroom work was not open at present in Plant 1, and asked me if I would take a temporary job in Plant 2.

Q. Mr. Sullivan told you that? [155]

A. That is right.

Q. Then what did you do or say?

A. Well, I accepted the job with the understanding that I would be transferred to Plant 1.

Q. Was there something said about that understanding at the time?

A. That was the job I was—my understanding I was hired for was Plant 1.

Q. Then you went to Plant 2 at Mr. Sullivan's direction?

A. That is right.

Q. On Tuesday night?

A. Tuesday night.

Q. Did you report to someone?

A. Well, I reported in to Joe Sickie, the foreman at Plant 2 on nights.

Mr. Esterman: I beg your pardon, Mr. Collins. I meant to show you this letter. I am sorry.

Q. (By Mr. Esterman) Go ahead, Mr. Witness.

A. Well, I reported in to him. The type of work they were doing in the toolroom was not at that time—it was a disappointment from what I had ex-

(Testimony of Leo Munkachy.)

pected, because they have mill hands and bench hands, and that was my line, mill shaper and bench. And I was more or less what you might say out to learn all I could, being only approximately two years of experience in the trade. And so I saw Mr. Sickie that [156] night and asked him for a release, because it was completely unsatisfactory to my estimation at that time. I went from there—he took me in to Howard.

Q. Is that Howard Sharrar?

A. That is right.

Q. Who is he?

A. He was the superintendent on nights at that time. And Howard, after taking me into the office Joe left me. I was left there alone with Howard, and he told me that within two weeks I was to have a transfer to Plant 1. And he even went so far as to take me over to Plant 1 and show me the tool room and told me who I worked under; the man he worked under, learned his trade from. He explained to me what I would do, all-around machine work on everything and would have a wonderful opportunity to learn.

Q. Who was this man he said——

A. I don't remember his name. All I remember was Nick.

Q. Mr. Ross Nickols?

A. Yes; an elderly man.

Q. Was it Ross Nichols; do you know?

A. Yes.

(Testimony of Leo Munkachy.)

Q. Did Mr. Sharrar take you over to the toolroom in Plant 1?

A. He took me over and showed me the tool room that night.

Q. From Plant 2? [157]

A. From Plant 2.

Q. Then what happened?

A. That was perfectly satisfactory to me. So I continued my employment in Plant 2, which I figured would be approximately two weeks from the statement he made.

Q. What statement did he make?

A. That I would be transferred to Plant 1 within two weeks.

Q. Did he say where in Plant 1 you would be transferred?

A. To the toolroom of Plant 1.

Q. Mr. Sharrar said that to you?

A. That is right. Well, from there two weeks went by, and at that time he told me to keep it under my hat. I have no idea what for, but that was the statement he made.

Q. Keep what under your hat?

A. The transfer until it comes. In general, the way I understood it, I wasn't to talk to any of the boys or anything; go back to the toolroom and continue working.

Q. Do you mean by that statement that he told you that your contemplated transfer to the toolroom in Plant 1 was something you shouldn't discuss with anyone; is that what you mean?

(Testimony of Leo Munkachy.)

A. That is what I gathered by it.

Q. What did he say?

A. Well, he said——

Q. Did he use those words, “to keep it under your hat”?

A. “To keep it under your hat” to quote him. [158]

Q. What work are you doing now?

A. Well, right now I am doing mostly grinding work.

Q. In what Plant? A. In Plant 2.

Q. After this conversation you just related with Howard Sharrar, did you ever take the subject up with him again with reference to your transfer?

A. Yes. I asked quite a number of times.

(The documents referred to were marked as Board's Exhibits Nos. 6 and 7 for identification and received in evidence.) [159]

BOARD'S EXHIBIT No. 6

Plant 1
Foremen

Plant 2
Foremen

Kenneth Freese

Paul Hawkins

Harry Swanson

Walter Ferguson

Howard Williams

Dale Evans

Fred Strehlein

Ross Nichols

Ferdinand LaCom

Bud Sorenson

Brian Johnson

(Testimony of Leo Munkachy.)

Leadmen

Leadmen

Jack Williams

Jack Gilbert

Albert Gardiner

James Brown

Warren Durbin

Ray Wildman

Homer Watters

William Suttie

George Orril

Howard Sharrar

Joseph Sickells

Frank Gifford

Thomas Mills

Joseph Wilson

Chief Engineer—Jack Kuhn

Test Superintendent—Fritz Gerber

Foremen—Earl Friar, Charles Noble, W. J. Kroening, Charles Pritchard.

BOARD'S EXHIBIT No. 7

Kinner Motors Inc.

(Cut)

635 West Colorado Boulevard

Glendale, California, U.S.A.

Please address all correspondence to Kinner Motors Inc., and reply in duplicate.

Telephones: Los Angeles, Chapman 5-1021; Glendale, Citrus 3-3141. Cable Address, Kinco, Bell System, Teletype Writer Service, Glendale 7078.

(Testimony of Leo Munkachy.)

February 23, 1944

Mr. Leo Munkachy
225 North Brand Boulevard
Glendale, California

Dear Mr. Munkachy:

We regret that in error you were told that we could not use you. We can start you in the tool room Monday night at \$1.05 per hour.

Please report at 4 p. m. Monday at the personnel office ready to start to work.

Very truly yours

KINNER MOTORS, INC.

E. J. SULLIVAN

E. J. Sullivan

Personnel Director

ELS:ic

Enc: Application

LEWIS GILPIN,

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Esterman): Your name is Lewis Gilpin?
A. Yes, sir.

Q. Where do you live, Mr. Gilpin?

A. 731½ Porter Street, Glendale.

Q. Where are you now employed?

A. Bendix, 11600 Sherman Way.

(Testimony of Lewis Gilpin.)

Q. Bendix what? A. Pacific Division.

Q. Of Bendix Aviation? A. Yes.

Q. What work are you doing there?

A. Tool room work.

Q. Does that mean making tools?

A. Yes, sir.

Q. What kind of tools do you make?

A. Make jigs, fixtures, tools for all operations; all kinds of tools, jigs and fixtures for tool work in [174] production.

Q. Do you work on any machines?

A. Yes, sir.

Q. First, tell me when you went to work for Bendix?

A. When I went to work for Bendix?

Q. Yes, when you started.

A. I started around the first part of March, 1944.

Q. You don't know the exact date?

A. No, I don't.

Q. Do you have any memorandums on you that would help you refresh your recollection?

A. I have my card.

Q. Will you look at it and tell us?

A. I don't know whether it gives the date. It don't give—3-6, and '44.

Q. That is the date you started? A. Yes.

Q. March 6, 1944? A. Yes.

Q. Thank you. You were discharged by Kinner Motors on February 24th; is that correct?

A. February 23rd.

(Testimony of Lewis Gilpin.)

Q. February 23rd? A. Yes.

Q. Did you work anywhere between the 23rd of February and [175] March 6th? A. No.

Q. Now, I started to ask you about Bendix and about the kinds of machines that you work on. Will you tell us?

A. I work on engine lathes, grinder, jig bore, drill presses, milling machines, and anything they got. They don't have them all. I work on them all.

Q. At least the ones you have named are ones you have worked on since you have been with Bendix? A. Yes; since I have been there.

Q. Were you about to mention something else?

A. I was going to tell you that I worked on all of them; planers, slotters, post mill.

Q. I am asking you now about machines you are working on at Bendix.

A. No, that isn't in Bendix.

Q. The last three you mentioned are machines you worked on somewhere else? A. Yes.

Q. Limit your answer to Bendix.

A. That is about all they have.

Q. What is your classification at Bendix?

A. Tool maker.

Q. What is your hourly wage?

A. \$1.35, with a 5-cent bonus. [176]

Q. Including 5-cent bonus?

A. That is \$1.35, plus 5-cent bonus.

Trial Examiner Spencer: That is 5 cents an hour bonus; is it?

The Witness: For night work.

(Testimony of Lewis Gilpin.)

Q. (By Mr. Esterman): You are a machinist; are you not? A. I am.

Q. This is a preliminary question: Generally, how long have you been working as a machinist? How long have you done machine work?

A. About 20 years.

Q. Can you tell us now when you first started?

A. Yes. In 1926.

Q. Prior to that date you had not worked on machines? A. No, sir.

Q. Where did you work in 1926 when you started?

A. Bessmer Diesel Engine Works, Grove City, Pennsylvania.

Mr. Esterman: May we go off the record a moment?

Trial Examiner Spencer: Yes.

(Discussion off the record.)

Trial Examiner Spencer: On the record.

Mr. Esterman: Mr. Examiner, might I, at this time, interrupt the examination of Mr. Gilpin temporarily and call another witness?

Trial Examiner Spencer: Yes. [177]

WORTH WRIGHT,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Esterman): Will you state your name and address, sir?

A. My name is Worth Wright, Pasadena Star News and Post, Pasadena 1, California.

Mr. Collins: Apparently they have some ads. If you will take a recess, perhaps we will save a lot of time on this.

Mr. Esterman: I want some testimony from this witness.

Mr. Collins: I mean if it is a question of the form of the ads on this thing.

Mr. Esterman: Counsel is looking at documents which the witness just handed me and which purport to show that certain ads did appear. I take it from his statement he means that where there are such ads or where the copy itself is indicated counsel may stipulate to the contents without asking me to elicit all that information from this witness. Is that [202] right?

Mr. Collins: Yes.

Mr. Esterman: Very well. I want to ask one or two questions of this witness.

Mr. Collins: I didn't get this witness' name.

Trial Examiner Spencer: Worth Wright.

When I reject an exhibit, if you want it in a re-

(Testimony of Worth Wright.)

jected exhibit file, please make a request to have it placed in the rejected exhibit file.

Mr. Esterman: I am sorry. I meant to make that request, Mr. Examiner, and I now make that request with respect to Board's Exhibit 9 with sub-letters.

Q. (By Mr. Esterman): What is your work?

A. Classified advertising manager of the Star News and Post.

Q. That is in Pasadena? A. Pasadena.

Q. During the course of your work have you had any business dealings with Kinner Motors, Inc., of Glendale in respect to placing of advertisements in your paper?

A. I do not handle the copy myself; it is handled by our employment girl, whose name is Miss Johns.

Q. When I say "you" I mean your paper.

A. Yes, that is right.

Q. You have had dealings with the company?

A. We do. [203]

Mr. Collins: I will stipulate to that. I am not making any basis of that——

Mr. Esterman: Then I am going to ask for a stipulation which may take a few minutes to read into the record, which I think will save a great deal of time

Trial Examiner Spencer: Very well.

Mr. Esterman: I will ask the company if they will stipulate——

Mr. Collins: First, let me look at these things.

(Testimony of Worth Wright.)

Mr. Esterman: Of course. May we go off the record?

Trial Examiner Spencer: If you want to take a brief recess to look over those papers, we will do that.

Mr. Esterman: Yes, sir.

(Short recess taken.)

Trial Examiner Spencer: The hearing will be in order.

Q. (By Mr. Esterman): With respect to the advertising copy which you brought in, Mr. Wright, it is a fact, is it not, in each instance where copy was ordered or placed with you it appeared simultaneously in both the Pasadena Star and the Pasadena Post; is that correct? A. That is correct.

Q. By that I mean that whatever ad would appear in one would appear in the other in the nature of a duplicate; is that correct?

A. That is correct. [204]

Q. How frequently do the papers appear?

A. Published daily and Sunday.

Q. Seven days a week?

A. Seven days a week.

Mr. Esterman: I will ask the company if they will stipulate with respect to the papers just mentioned by the witness that in 1943, from November 2nd, daily, through November 8th advertisements appeared bearing the name of the company, asking for machine shop, swing shift help, grinders, tool makers, milling machine, bullard radial drill, 60 hours a week, night bonus.

(Testimony of Worth Wright.)

I would like to have the record show, with respect to this stipulation, all the advertisements I am mentioning in my stipulation include the statement they all appear under or above the name of Kinner Motors, Inc.;

That from November 9th through November 15th, in the same papers, there appeared an advertisement asking for "grinders, bullard operators, machinists, radial drill, burr and file operators";

That for the period November 16th through November 22nd there appeared similar advertisements asking for "grinders, bullard operators, machinists, radial drill, janitors, 60 hours a week, night bonus";

For the period from November 23rd through November 29th, 1943, appeared an advertisement calling for "grinders, [205] bullard operators, machinists, radial drill and janitors."

The matters I am going to mention from here on are in the year 1944. That during the period beginning March 16th and running through March 22nd, inclusive, 1944, an advertisement appeared calling for "machine operators, engine assembly men, male and female, 60 hours a week, day and swing shifts";

That for the period March 24th through March 30th, inclusive, an advertisement appeared asking for "assistant chief cost accountant, must have production manufacturing experience";

That for the period from March 24th through March 30th, 1944, appeared an advertisement asking for "machine operators, engine assembly men,

(Testimony of Worth Wright.)

male and female, 60 hours a week, day and swing shifts”;

That for the period of March 31st through April 6th appeared an advertisement asking for “assistant chief cost accountant”;

For the period from March 31st through April 6th appeared an advertisement asking for “machine operators, swing shift, some unskilled openings”;

That for the period from April 7th through April 13th appeared an advertisement asking for “assistant chief cost accountant.” I am including that simply to preserve the continuity, not because I make any point of the cost accountant.

For the record April 7th through April 13th, 1944, [206] appeared an advertisement asking for “tool designers, day shift, also inspectors, day and swing shift, machine operators, swing shift, some unskilled openings”;

For the period April 14th through April 20th, inclusive, there appeared an advertisement asking for “tool designers, day shift, inspectors day and swing shift, machine operators swing shift, some unskilled openings.”

Trial Examiner Spencer: You have heard the reporter read the stipulation as posed by counsel for the Board. Is the stipulation thus proposed agreeable to the respondent, Mr. Collins?

Mr. Collins: Yes, I so accept it.

Trial Examiner Spencer: It is stipulated.

Mr. Esterman: I offered the stipulation and I join in it.

(Testimony of Worth Wright.)

Thank you, Mr. Wright.

(Witness excused.)

HELEN CHARLTON,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Esterman): May we have your name and address?

A. Helen Charlton, Los Angeles Examiner.

Q. In what capacity are you employed by the paper? [207]

A. I am the chief clerk of the classified accounting department.

Q. How long have you been employed in that capacity, approximately?

A. About a year in that capacity.

Q. In general, what are your duties?

A. I have charge of the classified accounting bookkeeping.

Q. In that capacity you are familiar with the various accounts of companies and persons that place advertisements in the paper; is that correct?

A. Yes, I am.

Q. During the course of that employment you have had occasion, have you not, to handle accounts with Kinner Motors, Inc., of Glendale?

A. Yes.

(Testimony of Helen Charlton.)

Mr. Esterman: May we go off the record one moment?

Trial Examiner Spencer: Yes.

(Discussion off the record.)

Trial Examiner Spencer: On the record.

Mr. Esterman: I am going to ask for a stipulation at this time. In each instance where I mention advertisement it is with the intention of stating that the particular advertisement which I will abbreviate and which I will confine simply to classifications and shifts in each instance—I mean to indicate it is an advertisement carrying the name [208] Kinner Motors and it appeared in the Los Angeles Examiner, a daily paper, which circulates here in Southern California, in the help wanted section under the classification male. I make that preliminary statement to save repetition.

I will ask the company if they will stipulate on November 1st an ad appeared asking for “grinders, tool makers, machinists, bullard radial drill operators for swing shift, 60 hours a week, night bonus”;

On November 3, 1943, an ad appeared which says, “burring and filing machine, operating swing shift, with or without machine shop experience”;

That on November 20, 1943, an ad appeared asking for “machinists, night shift, 60 hours a week, good wages”;

That on November 29, 1943, an ad appeared asking for “radial drill operators, day and night shifts, top wages”;

(Testimony of Helen Charlton.)

That on December 31, 1943, an ad appeared asking for "tool and cutter grinders";

That on February 18, 1944, an ad appeared calling for "machinists and research engineers, 100 per cent war industry";

That on March 3, 1944, appeared an ad asking for "mechanical and research engineers, 100 per cent war industry";

That on March 22, 1944, appeared an ad calling for "a tool designer, top pay, 100 per cent war work." That is all. [209]

Trial Examiner Spencer: Do you stipulate, Mr. Collins, to that?

Mr. Collins: I will so stipulate.

Mr. Esterman: I have offered the stipulation, and I join in it.

LEWIS GILPIN

called as a witness by and on behalf of the National Labor Relations Board, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

Trial Examiner Spencer: Mr. Gilpin, you have already been sworn, you were on the stand and you were testifying under oath?

The Witness: Yes. [216]

Mr. Esterman: My recollection is, Mr. Examiner, that the witness was starting to tell us about

(Testimony of Lewis Gilpin.)

his employment in 1926 at Bessmer Diesel Engine when I interrupted him.

Q. (By Mr. Esterman): Will you tell us at this time, Mr. Gilpin, first, for what period you worked at Bessmer Diesel Engine?

A. That was my apprenticeship, four years.

Q. You began in 1926? A. Yes.

Q. And ended when? A. In 1929.

Q. Where is that company or was it at that time? A. In Grove City, Pennsylvania.

Q. Now, with respect to the last year at Bessmer, and when I say last year I mean the latter part of your tenure at Bessmer, does your recollection serve you as to what kind of work you were doing at that time, when you left, in other words?

A. When I left there?

Q. Yes.

A. I was operating a milling machine.

Q. Did you operate any other machines?

A. Well, I have.

Q. While you were with Bessmer?

A. All of them, yes. [217]

Q. Will you name some of the machines you operated?

A. Shaper, planner, drill press.

Trial Examiner Spencer: On each one of these classifications, the reporter and myself are not familiar with them. Spell them out, if there are any unusual ones.

The Witness: Lathe, slotter, J. & L., that is turret lathe; Jones and Lampson.

Trial Examiner Spencer: J. & L.

(Testimony of Lewis Gilpin.)

Q. (By Mr. Esterman): Have you mentioned all the machines you recall at this time?

A. Grinders, surface, internal and external, boring mill. There are two of them—there is King and bullard. That is about all.

Q. You have now named all you can remember of the machines you operated when you were employed by Bessmer Diesel Engines?

A. That is right.

Q. What was your next employment after you left that company?

A. Goodyear Tire & Rubber Company, Akron, Ohio.

Q. You started there and left there when?

A. I started there in 1929, and left there in November, 1942.

Q. 1929 to 1942, you were there approximately 13 years; is that correct?

A. Close to 14. That is what I got my service record on. [218]

Q. Did you work in more than one department or phase of the plant?

A. Well, I worked just in the general machine shop first.

Q. For how long?

A. Oh, I was there about two years.

Q. Then after that? A. In the tool room.

Q. In the tool room? A. Yes.

Q. Was the last, approximately last 12 years then at Goodyear spent in the tool room?

A. Yes.

(Testimony of Lewis Gilpin.)

Q. Were you employed as a machinist or what were you employed as?

A. Well, I was employed as tool maker then. Machinist is a tool maker.

Q. Keep your voice up.

Trial Examiner Spencer: Do you associate the term machinist and tool maker?

The Witness: They do in the east, yes. They associate it. The machinist can operate in the tool room, as well as anybody else, if he is an A-1 machinist.

Q. (By Mr. Esterman): If he is a what?

A. If he is an A-1 machinist.

Q. If he is a skilled man? [219] A. Yes.

Q. Can you state in general what the nature of your work was in the tool room? I know it has been a great many years and covers quite a period of time. I want you to make a general statement of the work you did, what you did.

A. That was forming tools and templets.

Q. Have you in mind the machines which you mentioned a few moments ago, on which you worked at Bessmer, can you state whether or not you worked in general on the same types of machines when you were at Goodyear?

A. Well, as a rule, all but boring mills because they didn't have them there, up in the tool room.

Q. You mean in general you worked on the same kind of machines, except the boring mills because they didn't have any boring mills in Goodyear? A. No.

(Testimony of Lewis Gilpin.)

Q. Was there any machine you worked on at Goodyear they didn't have at Bessmer?

A. They had them all there, but I didn't work on all of them. They had them at Goodyear, the same as Bessmer.

Q. What machines did you work on at Goodyear?

A. On everyone except the boring mills; I never operated any boring mills there.

Q. You worked on every machine they had there?

A. Grinder, shaper, slotter, milling machine, planer, [220] internal, external grinder and also profile and profile sawing on tools.

Q. You worked on the machines they had there?

A. Yes.

Q. What did you do after November, 1942?

A. I came to California.

Q. I mean with reference to your employment? Did you go to Kinner Motors?

A. I did in 1942, in December, around about the 7th or 8th.

Q. You were hired as what?

A. I was hired in there, in the machine shop at Kinner.

Q. Now, do you know what your classification was at that time?

A. No, just general machinist, was all I know.

Q. At what rate, if you remember?

A. \$1.25.

Q. On what shift?

(Testimony of Lewis Gilpin.)

A. The night shift, the swing shift, I guess that is what they call it.

Q. Now, since December, 1942, until you were discharged in February of 1944, did you remain on the night shift all that time? A. Yes, sir.

Q. Did you remain in the machine shop all that time? [221]

A. No, I was only out there about a month, and I was transferred into the tool room.

Q. So that you went into the tool room in Plant 1 around January 1, 1943?

A. Around that time.

Q. Now, being in the tool room, does that mean that is where you did all your work?

A. That is where I did most of my work at Kinner's.

Q. I can't hear you.

A. Since I have been at Kinner's that is where I have done most of my work.

Q. I am trying to find out and I want you to tell us whether working in the tool room meant you spent most or all of your time in a particular place called the tool room; is that so?

A. Yes.

Q. If you left the tool room it was for what purpose, aside from going out to lunch or something like that?

A. It would be to go out and set up a job on a machine, on some tool we made, or a repair job on some fixture or jig.

(Testimony of Lewis Gilpin.)

Q. When you speak of setting up a machine, what do you mean?

A. I mean setting the jig for the machine.

Q. So the machine is set for the operator for him to work [222] on that particular machine?

A. That is right.

Q. It is a fact, is it not, so far as you were concerned in the tool room the work that you were engaged in during that period was not related to production in the sense you produced anything?

A. No.

Q. What you did was work on the tools used in production; isn't that right? A. Yes.

Q. During that period what machines at Kinner did you work on?

A. Well, there I operated a grinder, drill press, jig bore, lathe, shaper and once in a while I would go over and operate the bullard grinder at Plant 2; that is a big surface grinder with a magnetic chug on it.

Q. Under what circumstances would you do that? Would it be at someone's request that you go to Plant 2?

A. Yes, they would send me over to Plant 2 to operate the bullard grinder. They didn't have anybody over there to operate it; at least, they told me they didn't.

Q. Whom do you mean by "they," the foreman?

A. Nichols.

Q. Ross Nichols? A. Yes. [223]

(Testimony of Lewis Gilpin.)

Q. Has he been foreman of the tool room since you have been in the tool room? A. Yes.

Q. He is the man that you say sent you over to Plant 2? A. Yes.

Q. Did anyone else ever send you over to Plant 2?

A. One night he and Davey sent me over there to operate the bullard grinder, to show the fellow, Handzel, how to operate it for grinding tools.

Q. Was that the Handzel on the witness stand here yesterday? A. That is right.

Q. Was that shortly after his employment, do you recall?

A. I would say that was around January, 1944.

Q. By the way, when you left the company what was your wage rate?

A. \$1.30, plus that 5-cent bonus.

Q. You were in the midst of telling us the machines you worked on in the tool room. Had you finished that?

A. I finished that because that is all they had there.

Q. You worked on all machines in the tool shop?

A. I forgot about the cutter grinder. I done a lot of cutting grinder; that means the cutters for mills out in production. We regrind them, sharpen them.

Q. In connection with you tool work, did you ever do any [224] work out in the machine shop, aside from the set-up work and setting up of the

(Testimony of Lewis Gilpin.)

jigs and fixtures you mentioned? The repair work, what would that involve, generally?

A. Well, if a machine happened to break, something inside of it, I would take the piece back in the tool room and make another one and I would go back and put it in the machine.

Q. To that extent you would be working in the machine shop?

A. No, I made the part in the tool room. All I would be doing out there would be replacing it in the machine.

Q. Just putting it back in?

A. That is all. I wouldn't be doing no production work.

Q. During the time you were in the tool room at Kinner's, in your observation was there anyone else on the night shift that did any maintenance or repair work, anyone else other than you that did any maintenance or repair work such as you have described on the machines?

A. The other two fellows that worked with me, that was Davis and Swope.

Q. Did they do similar work?

A. Yes.

Q. When I say "similar work" I mean the work you have just described, going out in the machine shop and replacing tools which they had worked on in the tool room. Is that your understanding of my question? [225]

A. Yes.

Q. You mentioned Mr. Handzel, and made

(Testimony of Lewis Gilpin.)

the statement, I believe, that you broke him on some equipment.

A. On the bullard grinder in Plant 2, to show him how to operate it.

Q. At any time during your tenure, did you break in any other employees or show them how to operate machines?

A. No, I don't believe so. No, I didn't.

Q. Was your showing Mr. Handzel at the request of someone?

A. That was at the request of Nichols and Davey.

Q. Now, while you were at Kinner's did you ever hear of the classification of junior tool maker?

A. No.

Mr. Collins: I object to that, and move it be stricken on the ground that this man certainly isn't competent to determine what classifications Kinner may or may not have, the various classifications they may or may not have.

Trial Examiner Spencer: It is denied.

Q. (By Mr. Esterman): Have you ever heard anyone described, in the plant during that time, as a junior tool maker? A. No.

Mr. Collins: I object to that on the same basis.

Trial Examiner Spencer: Denied.

Q. (By Mr. Esterman): I believe your statement was that you [226] were hired in at Kinner's as a general machinist. What that your statement?

A. That is an all-around general machinist, all-around machinist.

(Testimony of Lewis Gilpin.)

Q. Who told you you were an all-around machinist, or were you hired as such?

A. Davey. He was the fellow I talked to.

Q. Now, at any time while you were with Kinner's were you ever advised by the company or by anyone connected with the company as to how you were carried on the company records with respect to your classification? A. No.

Q. As far as you know then when you left you were in the same classification as when you started?

A. That is right.

Q. You have stated you have operated surface grinders? A. Yes.

Q. Are you qualified to operate radial drills?

A. Yes.

Q. Have you operated them? A. Yes.

Q. Have you operated engine lathes?

A. Yes.

Q. Is an internal grinder different from an external grinder? [227]

A. Well, they have one that is a combination that is an internal and external; then they have grinders that are external only and some that are internal only.

Q. You have worked on all of those; have you not? A. Yes.

Q. And I believe you stated you worked on the boring machine? A. That is right.

Q. You have worked on a milling machine at Kinner's? A. Right.

(Testimony of Lewis Gilpin.)

Q. By the way, in connection with your tool making you work to particular tolerances, and I am speaking now of the accuracy under which you must do your work. Are there any particular tolerances you have to observe? A. Yes.

Q. Will you tell us what those are, if there is more than one?

A. Lots of it there was within two-tenths.

Q. Two-tenths of what?

A. A thousandth.

Q. Two-tenths of a thousandth?

A. That is right, up to five-tenths, which is a half thousandth.

Q. What is the operation of buffing and polishing, do you know? [228]

A. Yes, I know what it is. I never done any of it.

Q. Well, is it a comparatively simple operation or is it as skilled as some of the work you have done?

A. No, it isn't skilled. You could break a person in on it pretty easy.

Q. What does it involve, holding a part up to a revolving buffer?

A. A buffing wheel and buffing part.

Q. Do you know what a metalizer is?

A. No.

Q. Do you know what a Niteriding machine is?

A. No, I never heard of it.

Q. Niteriding?

A. No, I never heard of that before.

Q. You have never heard the expression?

(Testimony of Lewis Gilpin.)

A. No.

Q. Now, calling your attention to the 23rd of February, 1944—and I mention that date because it is the date that appears after your name on Board's Exhibit 3, indicating that on that date you were discharged, and that your classification was as a machinist, and that the reason for termination was "lack of work, tool room closed."

Calling your attention to that date, I will ask you if you reported for work on that date at the plant, Kinner's plant?

A. I did. [229]

Q. Approximately at what time?

A. At that time we was going to work at 5:30, 5:10 or something like that.

Q. Did you arrive alone, or was someone with you?

A. I arrived alone, but I met Davis there just at the gate.

Q. As you were coming in? A. Yes. [230]

Q. Did you both come in together?

A. Yes, we most generally always did if we met there, go in together.

Q. That was just before your shift started?

A. That is right.

Q. Will you tell us what happened? I might interrupt you from time to time.

A. We went in to punch our cards and the guard said we was wanted at the personnel.

Q. The card said that? A. The guard.

Q. I beg your pardon. Go ahead, Mr. Gilpin.

A. Jim went into the——

(Testimony of Lewis Gilpin.)

Q. By Jim you mean Davis?

A. Davis. He went into the rationing board there and—I don't know that part of it, what he told them.

Q. Tell what happened to you.

A. He came back out and we both goes over to the personnel. The lady in the personnel says, "Your checks are here."

Q. Do you know who that was?

A. No, I don't know her.

Q. Was it someone you had seen in the personnel office before?

A. Oh, yes, I had seen her before. I don't know her name.

Q. Keep your voice up. [231]

A. At that time I refused to take the check, until I found out more about what it was all about.

Q. Is that what you told her?

A. Well, I told her that I was going to find out first.

Q. Was Davis there at the same time?

A. Yes.

Q. What did he say or do?

A. He said he was going to do the same thing, until we could find out more about it.

Q. About this check. Now, before we go any further, were you advised that a check was there for you? A. By the——

Mr. Collins: I object to that as leading and suggestive.

(Testimony of Lewis Gilpin.)

Mr. Esterman: All right, I will withdraw the question.

Q. (By Mr. Esterman) What was said by anybody about the check at that time, first?

A. The first thing that was said, the girl said, "Your checks are here for you." And that is the time I refused to take mine. I wanted to find out what it was all about.

Q. That is what you told her? A. Yes.

Q. Did Davis tell her substantially the same thing?

Mr. Collins: That is objected to as leading and suggestive. [232]

Trial Examiner Spencer: Did Davis say anything? If so, what?

The Witness: I don't recollect whether he did or not right at that time.

Q. (By Mr. Esterman) Was Davis offered a check at that time? A. Yes.

Q. Did he take it? A. No.

Q. Very well. Go ahead.

A. And then Sullivan was sitting in his office, back there, and he called out to us and told us that he didn't know what this was all about.

Q. That was Mr. Sullivan who was on the stand here yesterday? A. Yes.

Q. When you say "us" you mean you and James Davis? A. That is right.

Q. Were you in his office or in another room when he said that?

(Testimony of Lewis Gilpin.)

A. I just walked into the door. That is all he told us. He didn't know what it was all about. Nick had called him up, that is, Nichols from the tool room and said he didn't have any more work for us.

So we went out of there to get our checks, to [233] check out our tools, and the Captain of the guard took us in. When we got over to the tool room, why, Nick was there, the foreman.

Q. Just a moment before you go ahead. I want to know if I understand you. Is it your testimony that Mr. Sullivan said to you, in substance, that——

Mr. Collins: It has been testified to. That is leading and suggestive. You are just repeating it. The record shows what he testified.

Mr. Esterman: Let me see if I understand the testimony.

Mr. Collins: It isn't a question of what your understanding of it is, Mr. Esterman. What he said is in the record. Go back and read it, if you didn't understand it.

Trial Examiner Spencer: Let's save a little time here. From my notes Sullivan called out and said he didn't know what it was all about, that Nick had called and said there was no more work.

Is that what you testified, in substance?

The Witness: Yes.

Q. (By Mr. Esterman) Did Mr. Sullivan say Mr. Nichols had called him and told him that?

A. Yes.

Q. That is what I am getting at.

(Testimony of Lewis Gilpin.)

Mr. Collins: I object to that as being leading and [234] suggestive.

Trial Examiner Spencer: Overruled. That is clearly what the witness intended to state, I think.

Q. (By Mr. Esterman) You were telling us about going out with the guard; is that right?

A. I was telling about the guard that took us over to where the tool room is in the plant.

Q. Go ahead.

A. And he told us, when we got over there, "I don't know anything about this."

Q. Who told you that? A. Nichols.

Q. Is that Ross Nichols you are talking about?

A. Yes.

Q. The tool room foreman? A. Yes.

Q. When you say Nick, you mean Ross Nichols.

A. Yes.

Q. What happened?

A. When he said he didn't know anything about it, I told him this had better be on the level. He didn't say any more to me about it. I went ahead over to my tool box and started to get my tools out, to be returned into the tool crib, and my checks.

Q. Did Mr. Nichols say anything to you at that time? [235]

A. Nothing only that part of it.

Mr. Esterman: I will ask the reporter to mark this document as Board's exhibit next in order.

(The document referred to was marked as Board's Exhibit No. 10, for identification.)

(Testimony of Lewis Gilpin.)

Q. (By Mr. Esterman) I show you a document which has been marked Board's Exhibit No. 10, and ask you if this is not, in fact, a document which you turned over to me or caused to be turned over to me a few weeks ago? A. That is right.

Q. And it was in your possession before that time? A. Yes, sir.

Q. What is this document?

A. Well, it is the termination.

Q. Is this something that was given you by the company at the time you left? A. It was.

Q. Will you tell us who gave it to you?

A. That was with our checks. This part of it was wrapped up with the checks (indicating).

Q. Did you get your checks the same night?

A. No.

Q. When did you get your checks?

A. The next night.

Q. You went back for it the next night? [236]

A. Yes. That was with the check (indicating).

Q. Did you discuss this Board's Exhibit 10 for identification with anyone connected with the personnel department? A. No.

Mr. Esterman: I offer at this time in evidence Board's Exhibit 10 for identification, for the purpose of showing the facts and circumstances surrounding the discharge of this witness by the company.

Trial Examiner Spencer: Is there any objection?

Mr. Collins: No objection.

(Testimony of Lewis Gilpin.)

Trial Examiner Spencer: It will be received.

(Thereupon the document heretofore marked for identification as Board's Exhibit No. 10, was received in evidence.)

BOARD'S EXHIBIT NO. 10

Deliver This Copy to the Worker at the Time
His Services Are Terminated

Use This Form Only for Reporting Termination of
Service Involving Possible Disqualification.

Social Security account number of worker 299-
01-4768.

Name of worker Lewis E. Gilpin.

Date of this notice February 23, 1944.

Last date individual worked February 22, 1944.

Date employer was informed of worker's termination of service if other than date entered in the preceding item.....

Employer's name and address must be typewritten or entered in ink.

Kinner Motors, Inc.

635 W. Colorado Blvd.

Glendale, California.

Do Not Ask the Worker to Sign This Form

Instructions for the Worker Appear on the Reverse

(Testimony of Lewis Gilpin.)

Termination Notice Concerning
Possible Disqualification
Cause of Termination of Service

Check item 1, 2, 3 or 4, or state the cause of separation under item 5. Present full explanation under item 6:

- 1 ☐ Left voluntarily
- 2 ☐ Discharged for misconduct connected with his work
- 3 ☐ Worker not able to work
- 4 ☐ Worker not available for work
- 5 ☐ Other cause
- 6 ☐ Explanation Lay-off; lack of work.
No available work for this employee.

I Certify That the information given on this form is true and correct to the best of my knowledge and belief.

By E. J. SULLIVAN M

Signature of individual completing this notice

California Department of Employment Affiliated
with Social Security Board.

Instructions to Worker for Use of Termination
Notice Concerning Possible Disqualification

As soon as possible, take this notice to the local employment office in the vicinity in which you live. If there is no United States Employment Service office in your town write the nearest office, asking when and where you can consult a representative of

(Testimony of Lewis Gilpin.)

the Department of Employment. It is important that you do this immediately, regardless of possible disqualification.

Do Not Destroy This Notice. Your employer is required to give it to you under the Regulations of the California Employment Commission.

If you file a claim for unemployment insurance or if you renew or continue a claim which was previously filed, Present This Notice as the time of registration for work and filing a claim.

You will be ineligible for unemployment insurance if the California Department of Employment determines that:

1. You quit your job without good cause (2 weeks ineligibility), or

2. You were discharged for misconduct connected with your most recent work without good cause (1-6 weeks ineligibility), or

3. You wilfully made a false statement or representation or wilfully failed to report a material fact to obtain unemployment insurance (4 weeks ineligibility).

You can not collect unemployment insurance when you are sick and unable to work.

If, without good cause, you refuse suitable employment when offered to you, or fail to apply for suitable employment when notified by the United States Employment Service office, you will be ineligible for unemployment insurance.

Failure to present this notice when filing a claim

(Testimony of Lewis Gilpin.)

for unemployment insurance may result in a serious delay in the determination of your insurance rights.

Warning: It is not necessary to employ anyone to help you collect benefits; someone in the local employment office will help you.

Q. (By Mr. Esterman) Now coming back to the night of your discharge. You stated that you had stopped and talked with Mr. Nichols. What happened after that? Was Mr. Davis with you at that time? A. Yes.

Q. Then what did you do?

A. We checked our tools into the tool crib. They kept a fellow over time so we could get our tools checked in.

Q. You mean the tools——

A. Over from the day shift.

Q. ——which are property of the company?

A. Yes, little brass checks that you take tools out of the tool [237] crib on, and then return them when you terminate.

Q. You and Davis both did that at the time?

A. Yes.

Q. Then what did you do?

A. The guard, after we got our tool boxes, escorted us out.

Q. Now, did you go back to the plant again?

A. No.

Q. After that date? A. No.

(Testimony of Lewis Gilpin.)

Q. You did say a moment ago, didn't you, you went back for your check?

A. Not in the plant, though. That is not in the plant, that is across the street from the plant.

Q. Is that the last time you were in the plant?

A. In the personnel office, yes.

Q. I mean, Mr. Gilpin, outside of the personnel office, the last time you were in the plant was the night that you have just described when you were escorted out by the guard?

A. That is right.

Q. In checking your tools? A. Yes.

Q. You haven't been in the plant since; have you? A. No.

Q. Did you go back the next day to the personnel office? [238] A. That is right.

Q. Were you alone or with someone?

A. No; Davis was with me.

Q. Tell me what you and Davis did with respect to the Kinner Company?

A. The next day when we went there, why, we got our check; that is all there was to it.

Q. Did you talk to anyone?

A. Nothing only just the girl.

Q. Did Davis talk to anyone?

A. There wasn't anybody there to talk to, outside of the girl in the office.

Q. What was the conversation with the girl?

Mr. Collins: I object to that as not binding on the company; incompetent, irrelevant and immate-

(Testimony of Lewis Gilpin.)

rial; no foundation laid; the discussion of the girl certainly wouldn't be binding.

Trial Examiner Spencer: I will hear it.

Q. (By Mr. Esterman) Answer the question.

A. Well, I just said, "This is an awful dirty deal." She said she didn't know anything about it. That is the substance of all we had to discuss with her.

Q. Was Mr. Sullivan in the office at the time you went back for your check? A. No. [239]

Q. Did you see him anywhere? A. No.

Q. By the way, what time of day was that, if you recall?

A. About 4 o'clock in the afternoon.

Q. Of the 24th?

A. Of the following day, the 24th.

Q. Now, prior to the 23rd of February, had anyone connected with management prior to the 23rd of February, 1944, had anyone connected with management—by that I mean foremen or persons of higher rank—either in the personnel office or superintendent's office told you that there was a lack of work at Kinner Motors? A. No, sir.

Q. Had any person in there that I have so characterized told you there would be or might be a layoff for that reason? A. No.

Q. Was the night of February 24, 1944, the first time you knew there might be a layoff for that reason?

A. I never knew it until I came to work.

Q. Until you went to get your time card?

(Testimony of Lewis Gilpin.)

A. That is right.

Trial Examiner Spencer: Were you told the night you were laid off or discharged why you were being laid off or discharged?

The Witness: I was not.

Mr. Collins: If the Examiner please, if I may have [240] the liberty of objecting to the question——

Trial Examiner Spencer: You have.

Mr. Collins: It is in the slip that was given to him, the reason.

Trial Examiner Spencer: He didn't get the slip until the next day.

Mr. Collins: It was there. He didn't take it, but it was there with his check that night.

Trial Examiner Spencer: Are you objecting to my question?

Mr. Collins: Yes.

Trial Examiner Spencer: All right. It is overruled.

Mr. Esterman: I understand the Examiner to be asking the witness if anyone told him orally why he was discharged.

Trial Examiner Spencer: That is right. You understood that?

The Witness: Yes.

Trial Examiner Spencer: Mr. Collins, you have the same privilege to object to my questions or move to strike testimony as if counsel for the board or any other party asked the questions.

(Testimony of Lewis Gilpin.)

Mr. Collins: I understand it really wasn't important. I probably merely should have called it to the attention of the Trial Examiner, rather than putting it in the form of an objection. What I mean to show was that instead of oral it [242] was by a written instrument.

Q. (By Mr. Esterman) Do you know Albert Stalker on the night shift? A. Yes.

Q. Do you know whether he went to work for the company before or after you did?

A. After I did.

Mr. Esterman: I might say that I am looking at Board's Exhibit 2.

Q. (By Mr. Esterman) I will ask you the same question about Fred E. Brown. Do you know him?

A. Fred E. Brown? There are several there. Yes, I know several of them.

Q. I am referring to Fred E. Brown listed on Board's Exhibit 2 as a machinist. Did you know a Fred E. Brown, a machinist?

A. Yes, I know him.

Q. Do you know whether he came with the company before or after you did?

A. He was there before I was.

Q. He was there when you came? A. Yes.

Q. How about Roy C. Walker?

A. Yes, he was there before I was.

Q. Did you know Henry Woodsford? [242]

A. Yes.

Q. Was he there when you came with the company? A. Yes.

(Testimony of Lewis Gilpin.)

Q. Was Alfred Woodsford there? A. Yes.

Q. Did you know Edward Anderson? He is listed here as a turret lathe operator.

A. Yes.

Q. Was he with the company when you came with them? A. Yes.

Q. Did you know Frank Keeley? A. Yes.

Q. Was he with the company when you came with them? A. Yes.

Q. Did you know Wallace Gerth? A. Yes.

Q. Was he with the company when you came with them? A. Yes.

Q. Now, directing your attention to the hearing in the prior case, which was conducted here in this room last December, did you attend any sessions of that hearing? A. I did.

Mr. Collins: Just a minute. May I have the answer stricken until I can interpose an objection?

Trial Examiner Spencer: Yes. [243]

Mr. Collins: I object to that on the ground it is incompetent, irrelevant and immaterial. Attendance out of curiosity to the hearing certainly couldn't be within the purview of this act.

Mr. Esterman: May I reply to that?

Trial Examiner Spencer: Yes.

Mr. Esterman: In the light of the questions I intend to ask, I think the attendance will have significance.

Trial Examiner Spencer: Very well. I will take it with the understanding you will provide a

(Testimony of Lewis Gilpin.)

link to the issues. The answer may be restored which I struck.

Q. (By Mr. Esterman) Now, the hearing took place in this room during four sessions, December 13, 15, 16 and 17, 1943. Just to refresh your recollection, the last day, December 17th, and I am looking at the transcript, it indicates that that particular session, the last day, was spent devoted almost entirely to all argument.

Were you present at any of those sessions?

A. I was present the first three days.

Q. You were not present then on December 17th?

A. No.

Q. You did not testify; did you?

A. No.

Q. Where did you sit in the hearing room?

A. Right back there where the Lieutenant is sitting now [244] (indicating).

Q. Are you indicating the second row of the three rows of seats? A. Yes.

Q. Were you present throughout those three days? A. I was.

Q. Did anyone sit with you, that is, right with you at the same place at anytime during those three days? A. Davis.

Q. Jim Davis? A. Right.

Q. You know, of course, he testified during the hearing? A. That is right.

Q. When he wasn't testifying, was he sitting with you? A. Yes.

(Testimony of Lewis Gilpin.)

Q. Did anyone else sit with you? Pardon me, was Davis present throughout the period that you were present for three days? A. He was.

Q. Did anyone else sit with you?

A. I can't recall.

Q. Who sat in the front row, if you know?

A. Well, one day there was Nichols.

Q. Who? A. Not Nichols—Johnson. [245]

Q. Is that Brian C. Johnson? A. Yes.

Q. And Davey? A. And Davey.

Q. Is that Mr. Davey, the superintendent?

A. Not Davey, I can't remember who they were.

Q. Was Mr. Sharrer in the hearing room any of that time? A. Malamphey was in here.

Q. Who is Malamphey?

A. Cliff Malamphey is assistant foreman, I take it, of the tool room. He takes over when the other one is not there.

Q. Mr. Sullivan was present during the hearing; wasn't he? A. He was.

Q. When he wasn't testifying, where did he sit, if you know? A. At the table.

Q. At the counsel table? A. Yes.

Q. Now, do you know Cadaret? A. Yes.

Q. He is generally referred to in the plant as "Caddy"? A. That is right.

Q. Was he present during that hearing?

A. I believe he was here one day.

Q. The record shows he testified. [246]

Now, at any time during those three days that you have referred to, did Mr. Sullivan speak to you

(Testimony of Lewis Gilpin.)

or to Mr. Davis in your presence when Davis was off the stand?

A. He didn't speak to me. I don't know about Davis.

Q. Did you speak to Mr. Sullivan?

A. No.

Q. Did you greet each other any time?

A. No.

Q. Did Mr. Sullivan indicate at any time whether he knew you were here or not?

A. He didn't act like it, so I didn't make no attempt.

Q. But he could have seen you?

A. That is right.

Mr. Collins: I object to that as calling for a conclusion of the witness.

Trial Examiner Spencer: I assume they were both in this small room, that they could have seen each other.

Mr. Collins: Certainly he certainly could have seen him; but whether he did or not, that is another thing. He certainly could.

Q. (By Mr. Esterman) Were you a member or are you a member of any labor organization?

A. I am.

Q. Which one?

A. The A. F. of L. Machinist local. [247]

Q. Is that the I.A.M.? A. Yes, sir.

Q. When did you become a member?

A. I belonged to the Machinist local several

(Testimony of Lewis Gilpin.)

times, two or three. In Akron, Ohio, I belonged. I belonged here in California.

Q. Were you a member when you came to Kinner's?

A. Not of the A. F. of L., but of the C. I. O.

Q. I am asking you, did you become a member or again become a member of the I.A.M. while you were at Kinner's? A. I did.

Q. When did that happen?

A. I think that was around—I can't remember just the date. It was somewhere in '43.

Q. Was it before the hearing in December?

A. I believe it was.

Q. Was it before the first of the year, 1944?

A. Oh, yes.

Q. In connection with that membership, were you given a button? A. I was.

Q. Machinist button? A. I was.

Q. Do you remember when that was given to you?

A. That was given to me the day I made out the application. [248]

Q. Did you ever wear that button?

A. I did.

Q. Did you ever wear it in the plant?

A. Yes, sir.

Q. Did you wear it all the time or part of the time or what was the fact?

A. I wore it all the time on my apron, on the top indicating).

(Testimony of Lewis Gilpin.)

Q. Do you have a machinist button with you?

A. No. I don't have one with me.

Mr. Esterman May I be excused for just a moment? I think I have one in my office.

Trial Examiner Spencer: Very well.

Mr. Esterman: I am showing the witness a black button that has red and white and gold printing on it. I am asking him if this is the kind of button or if it was a button similar to it.

A. That is the kind there (indicating).

Q. The button I have in my hand, which is perhaps slightly under an inch across, is black with an inner white border and carrying the legend, "Aeronautical Mechanics Lodge 758, I. A. M." Is that the kind of button you are speaking of?

A. Yes.

Q. Did you notice whether Davis and Swope, with respect to the period from January 1st to the time of your discharge, [249] whether they wore buttons like that or similar buttons?

A. They had buttons. I saw them wear them, yes.

Q. Did they wear them all the time?

A. I don't remember whether they wore them all the time. I would see them on them. I don't know whether they wore them all the time or not. I couldn't tell. They might come in with them on, maybe come in with it on their shirt and have the apron covered it.

Q. They did wear it sometimes in the plant?

A. That is right.

(Testimony of Lewis Gilpin.)

Q. And in the tool room?

A. That is right.

Q. Now, you were present throughout the hearing yesterday; were you not?

A. I was.

Q. Do you remember the witness, Mr. Dayhoff, who works for Kinner's?

A. Yes.

Q. Do you remember his being on the stand?

A. Yes.

Q. Do you remember generally the testimony on War Bonds?

A. I do.

Q. Do you recall his testifying there was some talking done by yourself and others on the subject of War Bonds?

A. Yes. [250]

Q. General conversation around the plant. Do you recall that testimony?

A. Yes.

Q. Will you state what, if anything, you said, or what your contribution was to those matters which the witness so described?

A. I would say that here or anywhere, that I thought anybody that would buy bonds for a profit while the boys was dying in France, wasn't very patriotic. I say give the money; they were giving their lives.

Q. Is that, in substance, what you said on the subject of War Bonds?

A. That is right.

Q. Did anybody ask you, while you were at Kinner's, to go to the Red Cross and give blood?

A. Yes.

Q. Did you attempt to do so?

(Testimony of Lewis Gilpin.)

A. No, sir, I was told not to.

Q. You made an attempt to donate blood?

A. I had donated before, and they told me not to do it any more.

Q. Who told you not to.

A. The doctor.

Q. Did you participate in any payroll deduction plan in connection with the purchase of Bonds?

[251]

A. Did I what?

Q. Participate in a payroll deduction plan?

A. I did.

Q. Was that throughout the time you were with Kinner's? A. It was.

Q. To what extent was deduction made from your pay checks? A. You mean how much?

Q. Yes. What percentage, if you know?

A. I don't recall what percentage they took out. I was supposed to get a Bond ever so often. I forget how many that is, what they told me. When I went in they took that much out of it.

Q. You didn't make any objection?

A. No.

Q. You consented to it, in fact? A. I did.

Mr. Collins: I object to that.

Mr. Esterman: I am asking if he consented to it.

Trial Examiner Spencer: He may answer.

The Witness: I did.

Trial Examiner Spencer: At the time you were discharged, how many persons, other than your-

(Testimony of Lewis Gilpin.)

self, were employed at the tool room at Plant No. 1 on the swing or night shift?

The Witness: Three. You mean from the time I went there? [252]

Trial Examiner Spencer: As of the date of your discharge.

The Witness: Three of us.

Trial Examiner Spencer: Three besides yourself?

The Witness: No, two besides myself.

Trial Examiner Spencer: Those two were——

The Witness: Davis and Swope.

Mr. Esterman: That is all.

Trial Examiner Spencer: What about the day shift, do you know whether they had a day shift in the tool room?

The Witness: They did.

Trial Examiner Spencer: Do you, of your own knowledge, know how many were employed on the day shift in the tool room as of the date of your discharge?

The Witness: I believe it was eleven.

Mr. Esterman: May I have the question?

(The record was read.)

Mr. Esterman: I was about to say I have no more direct examination. [253]

Q. (By Mr. Collins): How many people in the night shift did you discuss War Bonds with?

A. Anybody that said anything to me about them.

Q. How many? Can you name some of the people you discussed War Bonds with?

(Testimony of Lewis Gilpin.)

A. I can name one, but I don't know what his name is.

Q. Who?

A. He was from the office. I don't know what his name was.

Q. You don't know his name? A. No.

Q. What did you say to him?

A. I said just what I told you just awhile ago.

Q. What was that?

A. That I didn't feel that anybody that bought Bonds [278] for a profit instead of giving the money because the person over there was giving his life, that you should give it and not monkey with War Bonds.

Q. In other words, you said that you shouldn't buy Bonds, you should contribute to the Government? A. I said, "Give it."

Q. What did you say, though, about buying War Bonds? Anything else?

A. Didn't I just get through telling you?

Q. I am asking you if there was anything else.

Trial Examiner Spencer: Did you say anything further than you have already testified?

A. No, sir. I made that statement and I will make it again.

Q. (By Mr. Collins): In other words, you said you did not believe in buying War Bonds.

Mr. Esterman: I object to that.

Mr. Collins: This is cross examination.

Trial Examiner Spencer: Did you tell them that?

(Testimony of Lewis Gilpin.)

The Witness: No.

Q. (By Mr. Collins): You said you didn't believe in buying them, because instead of buying them you should give the money? Did anybody tell you that the United States was not receiving the money by way of gifts, but was using War Bonds? A. I knew that. [279]

Q. You knew that? A. I did.

Q. Still you said they shouldn't buy the War Bonds for that reason?

A. I still maintain they should do that; that is my own conviction.

Q. Have you given any money to the United States Government, instead of buying War Bonds?

A. I have for different hospitals.

Q. What hospitals?

A. Before I left Kinner's.

Q. When? What hospital?

A. I forget what that woman's name is in there. You can ask her.

Q. I asked you the name of the hospital?

A. I don't remember.

Q. I asked did you give any money to the United States Government instead of buying War Bonds?

A. No, I didn't, not directly; I didn't go to the President and give it to him.

Q. Did you give any to the United States Government? A. I did.

Q. You said a hospital. I am talking about the United States Government.

(Testimony of Lewis Gilpin.)

A. Doesn't that have anything to do with it; a Government [280] hospital?

Q. I am asking you now what Government hospital, then?

A. It is one of the Navy hospitals out here. I can't remember that name of that hospital. It has a funny name. I don't know what the name of the hospital is.

Q. Whom did you give the money to?

A. A girl that is in there, in the plant on the night shift.

Q. What girl? What is her name?

A. I told you I didn't know her name.

Q. What does she look like?

A. A tall, kind of blond-haired girl.

Q. What machine does she operate?

A. Drill press.

Q. Where in the machine shop?

A. Machine shop.

Q. What machine is it?

A. I just go through telling you a drill press.

Q. Which drill press? Where is it located?

A. In the machine shop.

Q. Where in the machine shop?

A. Do you want the corner?

Q. Yes, sir.

A. It isn't in a corner.

Q. All right. If it isn't in a corner, where is it in [281] the rest of the building?

A. Isn't that a heck of a thing to ask? About 10 or 15 feet inside the door.

(Testimony of Lewis Gilpin.)

Q. How much did you give her?

A. I don't remember just what it was, a dollar or something like that.

Q. Was it a dollar or what?

A. I will say a dollar.

Q. You will say a dollar? A. Yes.

Q. Was it a dollar? A. Yes.

Q. When did you give it to her?

A. On the night shift.

Q. I know, but what day of the month and what month?

A. I didn't pay any attention to the day of the month.

Q. Was it January?

A. I don't know whether it was January or not.

Q. Was it February?

A. I said I didn't remember.

Q. You don't have any idea at all? Could you give us within six months of the time?

A. Yes.

Q. All right. A. Around December. [282]

Q. Beg pardon?

A. December or January.

Q. Did she ask you for it? A. She did.

Q. Did you get any receipt for it?

A. I didn't.

Q. How many women work on that night shift?

Mr. Esterman: When?

Mr. Collins: At the time.

Q. (By Mr. Collins): At the time, how many

(Testimony of Lewis Gilpin.)

women were working on the night shift, at the time you gave this money? A. Two.

Q. Do you know their names?

A. I told you I didn't know the one. I don't even know the last name of the other one.

Q. Do you know her first name?

A. Just Cola. I don't even know how to spell it.

Q. That is the one you didn't give the money to?

A. No.

Q. Or is that the one you gave the money to?

A. No; that isn't the one.

Q. That is not the one? A. No.

Q. So if there were two of them, and one was named Cola, it would be the other one. [283]

A. That is right. [284]

Q. (By Mr. Collins): Now, Mr. Gilpin, did these views you had relative to the fact the Government should proceed by gifts to the Government than by the sale of War Bonds, did you discuss that with other people in the plant or did you discuss it with any of the day time employees?

A. I might have said that to anybody.

Q. How many people did you tell that to? Did you express that view to?

A. I don't know just how many.

Q. Didn't you go so far to tell some of the people there, in your opinion they should not buy War Bonds? A. I did not.

Q. Don't you recall you did that on several occasions? A. I did not.

(Testimony of Lewis Gilpin.)

Q. Didn't you tell them that the Bonds would be of no value after the war?

A. I told them just what I told you, and that is all.

Q. That is all. You didn't tell them the Bonds would be of no value after the war?

A. I did not.

Q. Did you ever hear Mr. Davis tell any of the employees at Kinner Motors that the War Bonds and War Stamps would be worthless after the war? [288]

A. I did not.

Q. Did you ever hear Mr. Davis say anything about War Bonds and War Stamps to the employees?

A. I don't know what Mr. Davis said about them.

Q. I didn't ask you that. I asked if you ever heard anything he said?

A. I don't know.

Q. Was he ever present when you made your remarks about War Bonds?

A. He might have been.

Q. Was he? A. I don't know.

Q. Were you ever present when he said anything to anybody about the buying of War Bonds?

A. I don't remember whether I was or not. I don't remember all that stuff.

Q. You mean it wasn't important?

A. It wasn't important, what he was talking about.

(Testimony of Lewis Gilpin.)

Q. What do you mean by speaking of War Bonds as being that "stuff"?

A. I said anything. It wouldn't make no difference whether it was War Bonds or not.

Q. You mean to say you have no recollection at all as to anything Mr. Davis said in your presence about War Bonds?

A. We probably discussed it, yes, between each other. [289]

Q. What was that discussion?

A. We discussed to see whether they would be any good. We don't know. We have a right to discuss it, though.

Q. What did you say?

A. I said we discussed it.

Q. All right. You discussed it. What did you say?

Trial Examiner Spencer: I assume that you want to know if he heard Davis make any statements in the presence of other employees?

Mr. Collins: Yes.

Trial Examiner Spencer: I don't intend to go into some private conversation between this witness and Davis.

Mr. Collins: I think that would be proper, too.

Trial Examiner Spencer: I would exclude it.

Mr. Collins: You would exclude it?

Trial Examiner Spencer: A private conversation.

Q. (By Mr. Collins): What did you hear Mr.

(Testimony of Lewis Gilpin.)

Davis say about War Bonds in the presence of other employees at Kinner's?

A. I said I didn't hear anything.

Q. Nothing. A. No.

Q. You mean by that, not that you don't remember, you just didn't hear anything; is that right?

A. I don't remember what he said; if he said anything [290] I don't know.

Q. Well, what do you mean, "I don't know"?

Mr. Esterman: I object to that.

Mr. Collins: I think we have to have that clarified.

Trial Examiner Spencer: The objection is sustained.

Q. (By Mr. Collins): Do you mean to tell us now for the record and to the Trial Examiner you never heard Mr. Davis say anything about War Bonds?

A. I told you between him and me.

Q. With other people being present?

A. There might have been, I don't know. I didn't pay any attention to who was around.

Q. Do you remember any conversation you had with him when other people were around? You just said they might be.

Mr. Esterman: Conversation about what?

Mr. Collins: About War Bonds. We are not talking about skilletts.

Mr. Esterman: The question is objected to as being vague and indefinite; calls for a reply, whatever it may be, which would be useless.

(Testimony of Lewis Gilpin.)

Trial Examiner Spencer: Well, I will take the answer. Let's get the answer.

Do you recall any conversation between you and Davis in which other employees of this company were present, when Davis said something about War Bonds? Do you recall it? [291] That is the question.

The Witness: Yes.

Q. (By Mr. Collins): All right. When was that? A. I don't know when.

Q. Well, about when?

A. May, December.

Q. In December?

A. Maybe January, I don't know when it was. An every day occurrence, we talked about different things.

Q. All right. Who was present on that occasion?

A. I believe Les Dayhoff was there once.

Q. What did Davis say?

A. He said what I told you just awhile ago, that he would rather give this money to the Government than to buy War Bonds, to make a profit off of the lives of the American soldiers.

Q. Did Mr. Dayhoff say if anybody in the United States felt that way we would have no war?

A. He didn't say what he thought.

Q. Didn't Mr. Dayhoff say at that time that if everybody felt that way, wouldn't buy War Bonds, we couldn't have production?

A. I don't remember what he said.

(Testimony of Lewis Gilpin.)

Q. What did you say?

A. I didn't say anything. You asked me what Davis said. [292]

Q. I am asking you now what you said.

A. I didn't say anything about it; that was their conversation, not mine.

Q. Did you ever have any conversation with Dayhoff?

A. Oh, yes.

Q. When?

A. You mean about Bonds?

Q. Yes.

A. Oh, I don't know whether I ever did or not, about Bonds.

Q. Use your best recollection. You say you don't know whether you did or not. Don't you know you really did have a talk with him?

A. No.

Mr. Esterman: Just a moment. I object to that. I think we should proceed by question and answer. We are here to elicit facts and not to argue with witnesses or to find out what the witness thinks about what they said at some prior time.

Mr. Collins: One of the best known forms of permissible cross examination is leading questions, your Honor. You might just as well cut off all cross examination if counsel hasn't the constitutional right of cross examining in the usual manner.

Trial Examiner Spencer: Do you know what you said [293] to this Mr. Dayhoff, if anything, about War Bonds? Do you recall?

The Witness: Do I have to repeat that same thing over again?

(Testimony of Lewis Gilpin.)

Q. (By Mr. Collins): Yes.

A. I told him I didn't think buying War Bonds for a profit for the lives of the American soldiers over there that were dying, I didn't think that was right.

Q. When you told him you didn't think it was right, what did Mr. Dayhoff say?

A. Well, he just said he didn't know.

Q. He said he didn't know. You heard him testify up here; did you? A. I did.

Q. Didn't he tell you he thought your views were very reprehensible?

Mr. Esterman: That is objected to because I can't tell from the question when he is supposed to have told the witness, whether counsel is talking about Dayhoff's testimony or whether it is a conversation between Dayhoff and the witness or a conversation in which they took part among others in the discussion of the subject of War Bonds.

Trial Examiner Spencer: At the time you made the statement to Mr. Dayhoff about the bonds, that you have testified you made, what did Mr. Dayhoff say, if anything? [294]

The Witness: He said he didn't know.

Trial Examiner Spencer: Did he say he thought your views on the matter were reprehensible at that time?

The Witness: No.

Q. (By Mr. Collins): Did he at any time, when you spoke to him about that? A. No.

Q. Do you know Mr. Gerth?

(Testimony of Lewis Gilpin.)

A. Yes, I know him.

Q. Did you ever have any talks with Mr. Gerth about War Bonds?

A. No, I never talked to him about them.

Q. Never at any time?

A. I might have, but I don't know. I might have talked to him, but I didn't talk about that. I talked about the machinery or something like that.

Q. When you say you might have, are you sure or are you not sure you talked to him?

A. I don't know.

Q. You don't know? Haven't you any recollection what you may have said to him about War Bonds? A. No.

Q. How about some of the other people on the night shift? Can you name some of the others you talked to about war Bonds? A. No. [295]

Q. You can't name a one you talked to about War Bonds? A. No.

Q. Can you name anybody on the day shift you talked to about War Bonds? A. No.

Q. You talked pretty generally to a lot of people along this line you have just testified here concerning the fact that you did not think buying War Bonds at a profit was right; is that right?

Trial Examiner Spencer: Did you say that to a number of employees?

The Witness: Yes, I have said that. Not only to employees, to anybody; I am saying it to you.

JAMES MACON DAVIS

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Esterman): You are James Macon Davis? A. That is right.

Q. You live where, Mr. Davis?

A. I live at 2300 North Parish Place.

Q. Will you talk up, please?

A. Burbank, California.

Q. You are the James Davis who is named in the charge and the complaint in this case; isn't that right? A. Yes, sir.

Q. You are also the same James Davis who testified at the prior case, to which there has been reference made here, on December 15, 1943, at least, in part, beginning at page 236—and I am showing you the index—and concluding with recross examination at 268; is that correct?

A. Yes, sir.

Trial Examiner Spencer: I think, just to have the record absolutely accurate, it would be better to give the [309] name and the title of the case. Will you again, please?

Mr. Esterman: The title of the case—and I am making this a part of my last question—being Kin-ner Motors, Inc., and International Association of Machinists, District Lodge No. 94, for and on behalf of Lodge 311, A. F. L.; Case No. 21-C-2307.

(Testimony of James Macon Davis.)

Q. (By Mr. Esterman): You are the same James Davis who was laid off on February 23, 1944?

A. Yes, sir.

Q. By Kinner Motors? A. Yes.

Q. Where are you now employed?

A. Bendix Aviation.

Q. How long have you been employed there?

A. Let's see, I believe I went to work there the 6th day of March.

Q. Have you been working there continuously since? A. Yes.

Q. At what work, please?

A. I am a tool and cutter grinder.

Q. What rate of pay?

A. \$1.20, plus 5-cent bonus.

Q. You are on the night shift?

A. I am on the swing shift.

Q. What was your rate of pay when you left Kinner's? [310] A. \$1.20, plus 5.

Q. You have been present here throughout this hearing thus far, have you not?

A. Yes, sir.

Q. You heard the testimony and examination of Mr. Gilpin on the subject of the gentleman whom Mr. Gilpin says came into the tool room and whom Mr. Gilpin couldn't identify? A. Yes, sir.

Q. You heard that testimony? A. Yes.

Q. You also recall Mr. Gilpin said you were present at that occasion? A. Yes.

Q. Were you present? A. Yes.

(Testimony of James Macon Davis.)

Q. Did you see that gentleman? A. I did.

Q. Do you know what his name is?

A. His name is Mr. Shaw.

Q. Do you know what he does in or with the company?

A. Well, at the time he was in charge of shop suggestions, and the pay-off of shop suggestions made by the employees, and also in charge of the bonds and stuff of that kind. Outside of that I don't know what his duties were.

Q. That was your understanding? [311]

A. That was my understanding.

Q. Did you hear this conversation concerning which questions were asked Mr. Gilpin, this conversation between Mr. Gilpin and the gentleman you now identify as Mr. Shaw? A. Yes.

Q. What was the conversation?

A. This gentleman, Mr. Shaw, approached Mr. Gilpin—I was standing just behind him.

Q. Louder, please.

A. And he asked Mr. Gilpin if he would sign up to buy more bonds.

Q. More bonds?

A. Yes, sir. Mr. Gilpin said no, that he didn't believe in buying bonds for a profit while the boys were shedding blood in Europe. He didn't believe in buying for a profit. He believed in giving them the money.

Q. Did Mr. Shaw say anything?

A. Mr. Shaw says, "I agree with you." He says, "I think that is the way it should be done."

(Testimony of James Macon Davis.)

Q. Was there any more to that conversation?

A. That is all I recall.

Q. Now, there has been some testimony in the record elicited on cross examination on the subject of cooking by yourself and Swope and Gilpin while you were employed by Kinner Motors. Have you seen anyone else doing any cooking [312] on the night shift at Kinner's?

A. Yes, sir.

Q. Tell us who.

A. Mr. B. C. Johnson, the night foreman of the machine shop.

Q. Is that Brian C. Johnson?

A. That is Brian C. Johnson.

Q. What have you seen him cooking?

A. Cooking soup, making coffee, roasting wienies; and that is all I recall of specific items.

Q. On more than one occasion?

A. On more than one occasion.

Q. Have you seen anyone else?

A. I have seen some of the employees making soup or coffee at different times.

Q. You mean in the machine shop?

A. Yes, and also on the day shift.

Q. You have seen that on the day shift?

A. Yes, sir, I have seen that on the day shift.

Q. In the machine shop?

A. In the final assembly.

Q. I didn't hear that.

A. Final assembly.

Q. Where is that in relation to the machine shop?

(Testimony of James Macon Davis.)

A. That joins the machine shop, on one side of the building. [313] Just a partition between them.

Q. Did you ever eat in the company canteen?

A. Yes, sir.

Q. When was the last time you ate there, if you know?

A. It was about, I would say, three months or three and a half months before my termination.

Q. After you stopped going to the canteen you cooked your own meals?

A. Yes, sir. Not all the time, but a majority of the time; sometimes I brought cold lunch.

Q. Did you make any of those trips outside that Mr. Gilpin spoke about, to a restaurant four or five blocks away? A. I did.

Q. Did you make any trips to another eating place about two or two and a half miles away?

A. Yes; about two or two and a half miles.

Q. What was your experience with the food at the canteen?

A. Well, on four different occasions I was sick. On this particular night, before we started cooking our meals, I was at the canteen and ordered two ham sandwiches. And while I was eating on the second sandwich I found a meat worm, a tapered worm in my ham. I immediately got up and put the worm on a napkin and carried it over to the personnel office in the company of Dick Swope, and showed it to Mr. Sullivan.

Q. You never ate there again; is that right?

[314]

(Testimony of James Macon Davis.)

A. No, sir, I never was inside the canteen again.

Q. Did you have your own cooking utensils or did they belong to the company?

A. I had my own.

Q. Were they given to you when you left?

A. No, sir.

Q. Did you take them with you?

A. No, sir.

Q. What happened to them?

A. One of the fellows from the day shift told Mr. Gilpin and myself they were distributed among the employees by the foreman, Ross Nichols.

Mr. Collins: I move to strike that as hearsay, that last answer, "I was told they were distributed."

Trial Examiner Spencer: It is hearsay. I will strike it on that ground. I do want the name of the employee that told him that.

What is the name of the employee that told you that?

The Witness: Jack Shelley. [315]

Q. (By Mr. Esterman): Have you ever heard any workmen at Kinner's referred to as a junior tool maker?

A. I never heard of that term before.

Q. Before you came to this hearing?

A. Before I came to this hearing.

Q. Now, you worked at Kinner's during what period? Give me the starting date.

A. I started to work for Kinner's October 13, 1941, and worked continuously for them until February 23, 1944.

(Testimony of James Macon Davis.)

Q. Was that all on one shift? A. No, sir.

Q. Will you indicate what shifts you worked on and approximately when you worked on them?

A. I worked about the first seven or eight months on the day shift, on the first shift. [316]

Q. What job? A. I was on sub-assembly.

Q. Of aircraft engines? A. Yes, sir.

Q. Go ahead.

A. I was transferred from sub-assembly to the machine shop, on the gear-hobbing machine.

Q. Did you say what shift you were on in the seven or eight months?

A. The day shift, No. 1 shift.

Trial Examiner Spencer: You were on the day shift when you were in the sub-assembly department?

The Witness: That is right.

Q. (By Mr. Esterman): Then you were transferred?

A. I was transferred onto nights, to run the gear-hobbing machine.

Q. How did that transfer come about, was it at your request?

A. It was: I had requested the transfer to the machine shop some time before.

Q. You mean you had asked for a chance at the first opening; is that what you mean? A. Yes.

Q. Apparently it came up and the company transferred you? A. Yes. [317]

Q. You were doing gear-hobbing how long? How long did you do that?

(Testimony of James Macon Davis.)

A. Off and on I did that about a year and a half.

Q. What happened then?

A. I started doing tool work along with the gear-hobbing.

Q. When you say off and on do you mean when you were off of it you were doing something else?

A. I was doing tool work, tool cutter, grinding and tool work in the tool room.

Q. At the same time you were doing the gear-hobbing in the machine shop?

A. Yes, sir.

Q. When was the next change, if any, in your status?

A. I did less all along—I did less and less work on the gear-hobbing machine, as there were two of us running the machine, one man on the day and one on the night and there wasn't enough hobbing to keep the machine running all the time. So the day man did most of the gear-hobbing and I worked in the tool room. Just occasionally I would help him out and run one or two nights.

Q. At whose direction did you proceed to do tool room work in addition to your gear-hobbing?

A. Mr. Ross Nichols.

Q. Who was he?

A. He was the day foreman. [318]

Q. Did the day foreman of the machine shop have anything to do with your performing these mixed operations?

A. Yes, sir. Mr. Davey or Mr. Swanson would often tell me, when there were a few shafts to run, that they would like for me to run them that night.

(Testimony of James Macon Davis.)

Q. You mean in connection with gear-hobbing.

A. Yes, sir, on gear-hobbing.

Q. You were ultimately transferred to the tool room exclusively, weren't you? A. Yes.

Q. About when did that happen?

A. About seven months before my termination.

Q. About the middle of 1943?

A. Something like that.

Q. Was that at your request or at the company's direction?

A. That was the company's direction.

Q. How did that come about? I mean who arranged it in the company, if you know?

A. Well, I got my instructions from Ross Nichols.

Q. He told you?

A. To work in the tool room.

Q. So you proceeded to go to work in the tool room? A. Yes, sir.

Q. That is where you were at the time you were laid off? A. That is where I was. [319]

Q. Now, you have had prior experience, have you not, working on machines? A. Yes, sir.

Q. And tools? A. Yes, sir.

Q. Now, prior to your tenure with Kinner Motors, where did you work immediately prior to your job at Kinner's?

A. I worked at Car Parts Depot, Incorporated.

Q. Where? A. El Paso, Texas.

Q. For what period?

(Testimony of James Macon Davis.)

A. From, I believe, in March, 1941, until October.

Q. 1941? A. '41

Q. What kind of a job did you have Car Parts Depot? A. I was doing machinist work.

Q. What kind of work did you do?

A. I was running piston cam grinder; also run a lathe and flash welders and did assembly.

Q. Flash welders? A. Yes, sir.

Q. What kind of assembly work? You did assembly work?

A. I did assembly work on motors, assembling motors.

Q. Airplane motors?

A. No, all kind of motors, outside of airplane.

[320]

Q. Did you work on any other machines at the Car Parts, other than the ones you mentioned?

A. I worked on the crankshaft grinder for a short time.

Q. Any others?

A. I used the bushing hone, which is known out here mostly as a lapping machine.

Q. L-a-p-p-i-n-g? A. Yes.

Q. Did you work on any other machines there?

A. I believe that is all I recall.

Q. Now, prior to March 1941, did you work anywhere? A. I worked at M & M Motors.

Q. Where is that?

A. That was in Midland, Texas.

(Testimony of James Macon Davis.)

Q. Did you tell us where the Car Parts Depot was? A. El Paso.

Q. El Paso. Thank you. How long were you with M & M motors at Midland?

A. About eight months.

Q. In what capacity? What was your job?

A. I was a mechanic and machinist.

Q. What kind of work did you do in Midland?

A. General automobile repairing, and we also had a lathe, boring mill and bushing hone, drilling press and wheel balancing or balancing machine.

[321]

Q. When you say you worked as a mechanic you mean you worked on the repair and maintenance of automobiles?

A. I worked on the repair and maintenance of automobiles.

Q. That covered what period, approximately?

A. That was about eight months before March, 1941.

Q. That would take us back, or you started around in July or August of 1940?

A. Somewhere around there.

Q. What did you do before December of 1940?

A. I worked for McDaniel's Garage and Machine at Petersburg, Texas.

Q. How long were you with that concern?

A. About 10 years.

Q. When you left McDaniel's Garage and Machine, what work were you doing? What work

(Testimony of James Macon Davis.)

were you doing towards the end of your time you spent with McDaniel's?

A. I was running a boring machine, doing acetylene and gas and flash welding of all types. And I operated a lathe part of the time and also did motor rebuilding, that is, automobile motors and irrigation welding motors and internal compulsion engines of all kinds.

Q. When you say rebuilding motors you mean you tore them down and put them together?

A. Yes.

Q. You worked on the internal part, that is, to grind [322] pistons——

A. Pistons and valves.

Q. Did they have a machine shop?

A. Yes.

Q. You did your work in the machine shop?

A. I did my work in the machine shop.

Q. In addition to your tearing down and building up the engines, what machines, other than the ones you named at McDaniel's, did you work on at McDaniel's?

A. At McDaniel's Garage?

Q. Yes.

A. I believe I have named the machines I used there.

Q. All right. Thank you. Now, with reference to the time you were with Kinner's—and when I say with reference to the time I mean the entire time—would you state, for the record, what equipment or machinery you did work on?

(Testimony of James Macon Davis.)

A. I have been on the filing machine, burring machine, buffing machine, shaper, jig borer, mills, bench lathe, engine lathe, cutter grinding, external and internal grinder and also a surface grinder.

Q. Did you work on a drill press?

A. Yes, sir.

Q. Have you named all the machines you can recall now?

A. I have used a bushing lapping machine, also.

Q. Did you ever work on a turret lathe? [323]

A. I never worked on a turret lathe.

Q. Did you ever work on a milling machine?

A. Yes, sir.

Q. At Kinner's? A. At Kinner's.

Q. When you hired in to Kinner's were you required to advise the company of your previous experience? A. Yes.

Q. Your previous work experience?

A. Yes, we filled out a form, application, that had a list of the different machines or operations that you had experience on.

Q. Did you give the company, in that application, substantially what you have told us in the way of information as to your previous experience?

A. I didn't list all the machines I had operated. The machines I left out I didn't care anything about operating if I could get the ones I wanted.

Q. You were concerned with the machines that you thought Kinner's had and you wanted to work on at Kinner's?

(Testimony of James Macon Davis.)

A. I put down machines I liked to run and was best at.

Trial Examiner Spencer: What is a radial drill?

The Witness: That is a drill that can be—the head can be swung around to any position for fast operations, lowered or raised. [324]

Trial Examiner Spencer: Have you been engaged on that operation while you were at Kinner's?

The Witness: No, I never run one while I was at Kinner's.

Trial Examiner Spencer: Did you ever at any time run one?

The Witness: No.

Q. (By Mr. Esterman): You have worked on a drill press; haven't you? A. Yes.

Q. Isn't it a fact that the only difference between a radial drill and a drill press is that in the case of a drill press the spindle is fixed?

A. Yes.

Q. In the case of a radial drill you can move the spindle?

A. The drill press, the drill head won't swing around, you can move the table sometimes. The only way the head moves is straight up and down.

Q. That is in the drill press? A. Yes.

Q. The radial drill, you can move the head without moving the table; isn't that right?

A. Yes, you can move it around to any location.

Q. Have you seen radial drills in operation?

A. Oh, yes. [325]

Q. In your opinion does it take any more skill

(Testimony of James Macon Davis.)

or less skill to operate a radial drill than a drill press?

A. I would say it takes less skill to run a radial drill. You don't have to move your job around. You can move the head, you can put your job stationary and move to the position you want quickly.

Q. At any time while you were with Kinner's, that is, until the 23rd of February, 1944, did anyone connected with management prior to that date say anything to you on the subject of or to the effect that the volume of work available was falling off?

A. No, sir.

Q. Was that the first date you heard that the work was falling off?

A. That was the first date. We always had plenty of work to do, and even had work ahead when we were off.

Mr. Collins: I move to strike that as not responsive.

Trial Examiner Spencer: I deny the motion. I want to ask the witness if he was advised on the date he was laid off that there was a lack of work.

Were you?

Mr. Collins: May I object to that question?

Trial Examiner Spencer: Surely.

Mr. Collins: That calls for a conclusion.

Trial Examiner Spencer: He was advised or not doesn't [326] call for a conclusion, Mr. Collins.

Mr. Collins: Beg pardon?

Trial Examiner Spencer: I asked the witness whether he was advised.

(Testimony of James Macon Davis.)

Mr. Collins: I didn't hear that, sir. I am sorry.

The Witness: I was not advised.

Mr. Collins: Might I call the attention of the Trial Examiner, as I did before, to the fact that the slip that he received advised him. I suppose you are speaking of verbally, in addition.

Trial Examiner Spencer: That is right.

Mr. Esterman: I understood it that way.

Trial Examiner Spencer: Did you understand I was asking you if you were advised verbally there was lack of work?

The Witness: Yes.

Trial Examiner Spencer: What was your answer to that?

The Witness: I said I was not advised. We didn't see this paper he is talking about until the second day after we were fired.

Mr. Collins: I move to strike that as a conclusion of the witness, upon the basis it was there and he didn't choose to look at it.

Trial Examiner Spencer: The motion is denied. When was the first time your separation slip was presented to you?

The Witness: On the 24th. [327]

Trial Examiner Spencer: Did you receive it at that time?

The Witness: On the 24th?

Trial Examiner Spencer: Yes.

The Witness: Yes, sir, I received my check and this slip, termination slip and also a refund on war bonds that I had been buying.

(Testimony of James Macon Davis.)

Trial Examiner Spencer: On the 24th of February?

The Witness: On the 24th.

Mr. Esterman: I intend, of course, to go into that, if the Examiner please.

Q. (By Mr. Esterman): You have told us you were the same James Davis who testified at the prior hearing; is that correct? A. Yes.

Mr. Esterman: At this time, Mr. Examiner, I offer for the record, for incorporation by reference, the testimony of this witness in the prior case, beginning at page 236 in the previous transcript, and specifically of December 15, 1943, and concluding at page 276. I might say that includes all the examination, direct, cross, redirect and recross.

[328]

Mr. Esterman: I will ask Mr. Collins if he will stipulate at this time if in the last hearing, in the prior case, last December, he was not, in fact, a member of the Board of Directors of Kinner Motors, Inc.?

Mr. Collins: Yes, I will so stipulate.

Mr. Esterman: I will ask him if he will stipulate that is still a fact.

Mr. Collins: Yes. [329]

Q. (By Mr. Esterman): Now, on the night of February 23, 1944, did you report for work as usual? A. Yes, sir.

Q. By that I mean at the usual hour?

A. Yes, sir.

Q. And that was about what time, Mr. Davis?

(Testimony of James Macon Davis.)

A. That was around 5:10.

Q. P. M.? A. Yes.

Q. Were you alone or were you with someone?

A. I was alone until I arrived in the parking lot and I met Mr. Gilpin at the gate, close to the gate, and proceeded to the clock room.

Q. What happened there?

A. I went in to punch my clock card, master card, and it was not in the rack.

Mr. Gilpin was behind me, and I turned around to say to Gilpin that I wondered where my card was, and before I could get the sentence finished one of the guards said, "You boys are wanted over at the personnel right away."

I said, "O. K." But that I had to step into the transportation office. I went into the transportation office and asked about some gasoline ration I had applied for several days before. The lady looked at me, Miss Gremmels looked at me kind of bewildered, and she said, "You are terminated. [330] Didn't you know it?"

I said, "No, I better go find out about it." So I went back outside and joined Mr. Gilpin and proceeded to the personnel office.

The guard stayed with us until we got to the front gate, and we crossed the street to the personnel office.

Q. All right. Did you both go into the personnel office? A. Yes, sir.

Q. What happened there?

(Testimony of James Macon Davis.)

A. Just as we entered the girl called from across the room and said, "Do you fellows want your checks?"

Mr. Gilpin says, "No, I don't know whether I do or not. What is the reason?"

She said, "I don't know anything about it." She looked down on the desk at some papers, and she said, "This says 'lay-off, lack of work.'"

About that time Mr. Sullivan, who was in his office, and the door was open, called out and says, "Boys, I don't know a thing about this." He said, "Nick just called me and said there wasn't any work for you."

Q. Had you said anything to Mr. Sullivan?

A. No.

Q. Had you directed any remarks to Mr. Sullivan before he said that? A. No. [331]

Q. Did he volunteer that to you?

A. He volunteered that to us.

Q. Had Mr. Gilpin said anything to Mr. Sullivan? A. No, sir.

Q. What happened then?

A. We discussed the gasoline book. He said before we could get our checks we would have to turn in the gasoline books.

Q. Who said that?

A. Mr. Sullivan. And Mr. Gilpin only had the cover, but he didn't have any stamps. So they told him they couldn't give him his check until he produced—they finally agreed—Mr. Sullivan agreed to take the cover in place of the tickets.

(Testimony of James Macon Davis.)

Q. Did you and Gilpin then leave? What happened then?

A. I asked the girl if I could use the telephone. She refused. She said, "We don't have a telephone available. The office is closed," or something of that kind. There was a public telephone on the grounds, hooked directly to the Glendale or some telephone office. [332]

Q. (By Mr. Esterman): What were you told?

A. She said there wasn't a telephone available.

[334]

Q. (By Mr. Esterman): Are you a member of any labor organization? A. Yes, sir.

Q. Which one? A. CIO.

Q. CIO what; any particular union?

A. United Automobile Workers of the CIO.

Q. Are you a member of any other labor organizations? A. Not at present.

Q. Have you ever been a member of any other labor organizations? A. Yes, sir.

Q. Which ones? A. A.F.L.

Q. Machinists?

A. Machinists, International Association of Machinists, A.F.L.

Q. Were you a member of the Machinists at any time while you were employed with Kinner's?

A. No, sir, I wasn't.

Q. Where were you a member of the I.A.M.?

A. In El Paso, Texas.

Q. When you came here, did you renew your membership in any other I.A.M. local?

(Testimony of James Macon Davis.)

A. No, I didn't renew the membership. I signed an [336] authorization card around, I would say around April or May of '43.

Q. Was that in Lodge 758?

A. I believe it was 311 at that time. I later filled out and transferred the card over to 758.

Q. You say you transferred. Do you mean the authorization? A. Yes.

Q. Were you, during your employment with Kinner's, active in connection with the attempt of the I.A.M. to organize the plant? A. Yes, sir.

Q. What was the nature of your activity, and indicate, if you can, when it took place?

A. Around the first part of 1943 the A. F. of L. were handing out a few handbills at the plant, at Kinner's. A few days after some of the handbills had been handed out I heard of a plan to organize the Kinner Motors Employees Association or a company union, as they called it, at that time.

Q. Will you bear in mind, in your answer to my question, that I am asking you for your activity in connection with the I.A.M. efforts to organize the plant. You are keeping that in mind?

Mr. Collins: You are referring to the I.A.M.?

Mr. Esterman: I.A.M., International Association of Machinists. [337]

Mr. Collins: That is a branch of the A. F. of L., affiliate?

Mr. Esterman: I don't think these gentlemen will accept that. It is a part of it.

(Testimony of James Macon Davis.)

Trial Examiner Spencer: Why not agree to use the title "Machinists," whenever that is used it refers to the I.A.M. Will that be satisfactory?

Mr. McGraw: That is our common name.

Mr. Collins: That is all right with me.

Trial Examiner Spencer: It will save some confusion if we have one name to use throughout.

Q. (By Mr. Esterman): My question went to your activity in connection with the attempt of the Machinists to organize the plant. Will you keep my question in mind in replying? I am not interested in other matters if they don't bear on your efforts to help. Do you understand that?

A. Yes.

Q. Will you go ahead with your answer?

A. I don't understand the question just exactly.

Trial Examiner Spencer: As I understand it counsel wants you to describe your activity in connection with the Machinists organization of Kinner's employees. What did you do in that connection, if anything?

Q. (By Mr. Esterman): That is, the Machinists' attempt to organize. Do you understand it now? [338]

A. Yes, sir. I handed out a few cards, authorization cards.

Q. When was that, if you know?

A. That was, I would say, around July or August.

Q. 1943?

A. And also since the hearing.

(Testimony of James Macon Davis.)

Q. You mean since the December hearing?

A. Since the December hearing.

Q. You handed authorization cards to employees of Kinner's?

A. Yes, sir.

Q. Do you recall approximately when you last passed out any authorization cards?

A. I would say the last—around February the 15th.

Q. 1944?

A. Yes.

Q. Did you attend any meetings of Lodge 758?

A. Yes, sir, I did.

Q. How many meetings did you attend?

A. I believe I was there at two meetings; not any more than two.

Q. In Glendale?

A. No, in Burbank.

Q. Did you, at any time, wear a Machinists' Union button in Kinner's plant?

A. Yes, sir, I wore it, I would say, outside of just a few [339] nights all the time.

Q. Did you wear it all the time outside of the few nights since last December until you were laid off?

A. Yes, sir.

Q. When did you start wearing the button, if you know?

A. I started wearing a button, I believe it was in the latter part of December or January, first part of January.

Q. Of this year?

A. Yes, sir.

Q. Did you wear that on your work clothes when you were working?

A. Yes.

(Testimony of James Macon Davis.)

Q. Is that button similar in nature or the same as the button I described in this record in connection with a previous witness? A. Yes.

Q. Was it a black button about the size of a 25-cent piece? A. Yes.

Trial Examiner Spencer: Physically, where were you when you handed out these authorization cards?

The Witness: I was in the parking lot. Also at the lunch hour; we usually went outside the building. Sometimes we would go out for five or ten minutes outside the plant to get a little fresh air at the lunch period.

Trial Examiner Spencer: Did you hand any of them out in- [340] side the plant at all?

The Witness: I don't recall.

Trial Examiner Spencer: We will take a short recess. We will take about 10 minutes.

(Short recess taken.)

Trial Examiner Spencer: On the record.

Q. (By Mr. Esterman): You stated earlier in your testimony, Mr. Davis, that you were a member of the CIO-UAW; is that correct?

A. Yes, sir.

Q. When did you become a member of the CIO?

A. After I went to work for Bendix, which is under CIO contract.

Q. That is the reason you joined the CIO?

A. That is the reason I joined the CIO.

Mr. Esterman: Will you please mark this for identification?

(Testimony of James Macon Davis.)

(Thereupon, the document referred to was marked Board's Exhibit No. 11, for identification.)

Q. (By Mr. Esterman): I show you a document which the reporter has identified as Board's Exhibit No. 11, and I ask you if this is not, in fact, the notice which was handed to you at the same time you got your check from Kinner's; is that correct? A. Yes, sir. [341]

Q. Was this received by you with your check the day after you were laid off?

A. Day after.

Q. 24th of February?

A. 24th day of February.

Q. Did you go back there with Lewis Gilpin?

A. Yes, sir.

Q. At the same time? A. Yes, sir.

Q. Did you personally talk to anyone connected with the company at that time?

A. I talked to Mr. Sullivan's assistant, a lady that is employed in the personnel office.

Q. Do you know her name?

A. No, I don't know her name.

Q. Was it about your lay-off? Was your conversation about your lay-off?

A. No, I went back after my check on the 24th day of February.

Q. Well, was the conversation with this assistant on the subject of your lay-off?

A. Yes, sir.

(Testimony of James Macon Davis.)

Q. You discussed it with her?

A. I told her I was ready for my check at that time.

Q. She gave it to you? [342]

A. She gave it to me.

Q. Was that, in substance, what was said?

A. That was all the conversation I recall with her.

Q. Did you see Mr. Sullivan on that day?

A. No, I didn't see Mr. Sullivan.

Mr. Esterman: At this time I offer in evidence a document which has been marked as Board's Exhibit 11 for identification.

Mr. Collins: No objection.

Trial Examiner Spencer: It is received without objection.

(Thereupon, the document heretofore marked Board's Exhibit No. 11, for identification, was received in evidence.)

BOARD'S EXHIBIT No. 11

Deliver This Copy to the Worker at the
Time His Services Are Terminated

Use This Form Only for Reporting Terminations
of Service involving Possible Disqualification

Social Security account number of worker
456-09-9984

Name of worker James M. Davis

Date of this notice February 23, 1944

Last date individual worked February 22, 1944

(Testimony of James Macon Davis.)

nected with your most recent work without good cause (1-6 weeks ineligibility), or

3. You wilfully made a false statement or representation or wilfully failed to report a material fact to obtain unemployment insurance (4 weeks ineligibility).

You can not collect unemployment insurance when you are sick and unable to work.

If, without good cause, you refuse suitable employment when offered to you, or fail to apply for suitable employment when notified by the United States Employment Service office, you will be ineligible for unemployment insurance.

Failure to present this notice when filing a claim for unemployment insurance may result in a serious delay in the determination of your insurance rights.

Warning: It is not necessary to employ anyone to help you collect benefits; someone in the local employment office will help you.

Mr. Esterman: May I see the personnel records that are here, particularly the one of Mr. Davis?

Mr. Collins: Yes.

Trial Examiner Spencer: Off the record.

(Discussion off the record.)

Trial Examiner Spencer: On the record.

Q. (By Mr. Esterman): Now, you heard the testimony, the examination of Mr. Gilpin on the subject of war bonds; did you not?

A. Yes, sir.

(Testimony of James Macon Davis.)

Q. While you were employed by Kinner Motors did you [343] participate, by way of payroll deductions, for war bond purchases? A. I did.

Q. To what extent, if you remember?

A. I believe I was getting a bond every two months.

Q. What kind of a bond, what size?

A. \$25.00 bond.

Q. Every two months? A. Yes, sir.

Q. Did anyone connected with Kinner Motors tell you on or about February 23rd verbally you were being laid off or discharged?

A. No, sir.

Q. Do you know, in fact, who laid you off or had you laid off? A. I do not know.

Q. Now, you and Gilpin and Swope were the only three, at least between December of last year and the time you left, working in the tool room on the night shift; is that not correct?

A. That is right.

Q. You three were pretty friendly, were you not, outside of working hours? A. Yes, sir.

Q. You saw a good deal of each other? [344]

A. Yes, sir, we had visited in the homes of each other.

Q. Your families were acquainted?

A. Yes, sir.

Q. You spent some time together outside of the plant? A. Yes, sir.

Q. Now, the record shows, of course, you testified at the prior hearing. And it also shows that

(Testimony of James Macon Davis.)

three days were occupied in taking testimony in the prior case. You testified on one of the four days or at least on one of the three days when testimony was taken. How many of the four days were you present in respect to that hearing, in this hearing room?

A. I was here every day but the day of the argument, the last day. I left before the argument was over. I didn't stay for that.

Q. Did you hear anything of the argument?

A. No, I came up here to hear the argument, and after I got up here I didn't feel good so I decided to go home. I was pretty tired after missing all that sleep.

Q. You were present throughout the hearing, during the three previous days; is that correct?

A. Yes.

Q. When I say "throughout" I mean from the beginning to the end of each session?

A. Yes.

Q. When you weren't testifying, where did you sit in the [345] hearing room?

A. Most of the time on the second row from the front (indicating).

Q. Indicating a second of three rows of the benches; is that correct?

A. Yes.

Q. Did anybody sit with you when you were sitting in the second row?

A. Mr. Gilpin was with me two of the days, and Mr. Swope was with me the other day.

Q. Were any representatives of management,

(Testimony of James Macon Davis.)

other than those who testified—I will withdraw that.

Did any representatives of management—by representatives of management I mean foremen or personnel men or administrators or supervisors—sit in any of those three rows during the time that you sat there, during the hearing? A. Yes.

Q. Will you name some of them?

A. Mr. Davey.

Q. He is the superintendent?

A. He is the works manager of Plant 1.

Q. Where did he sit, if you recall?

A. He was sitting on the front row.

Q. Was he present throughout?

A. No, he was here one day that I know of. I don't know [346] whether he was here another day. I don't remember. I know he was here one day.

[347]

Q. (By Mr. Esterman): You mentioned Mr. Davey was there. Were any other representatives of management sitting in the hearing room during the course of the hearing in those three rows of Benches?

A. Mr. Sullivan was sitting at the table. And Mr. Johnson.

Q. Is that Brian Johnson?

A. Brian C. Johnson was sitting on the front bench with Mr. Davey.

Q. That was when Johnson wasn't testifying?

A. Yes.

Q. How much time did Johnson spend here, if you know?

(Testimony of James Macon Davis.)

A. I believe just the one day was all he was here.

Q. Was Ross Nichols present at any time during the hearing?

A. I don't believe he was; I am not sure.

Q. Now, did any of the gentlemen whom you have mentioned as being representatives of management at any time, during the hearing and while you were sitting back there, indicate they recognized you in any way?

A. Well, they passed by me at different times going out to the hall or coming in. And I also was up and back to the door [348] and back by them several times probably during the day.

Q. Did they greet you or say "hello," or anything of that sort?

A. Not that I recall.

Q. Your foreman during the time you worked in the tool room was Ross Nichols; was he not?

A. That is right.

Q. He was your foreman during the time of the hearing and he continued to be your foreman until the time you left the plant; isn't that right?

A. Yes, sir.

Q. Until February, 1944?

A. Except for a period of about five or six weeks, in which Cliff Malamphey was acting in his place.

Q. Cliff Malamphey? A. Yes.

Q. Is that M-a-l-a-m-p-h-e-y?

A. I believe that is right.

(Testimony of James Macon Davis.)

Q. Can you indicate when that period was?

A. That was, I think, around July or August of '43. Mr. Nichols was on his vacation.

Q. Malamphey acted in Nichols' place?

A. Yes. I am not sure about the time that he was on his vacation, but he was out five or six weeks.

Q. What did Malamphey do when Nichols was there, what was [349] his job, if you know?

A. His job was to give out the work for the day crew, as well as the night crew.

Q. You mean in the tool room?

A. Yes. He did more or less of that all the time since I have been employed in the tool room all along.

Q. Did he give work out to you and Swope and Gilpin? A. Yes.

Q. By that you mean he would assign you to particular work? A. Oh, yes.

Q. Did he do any work, productive work in the tool room himself?

A. Some, not a great lot. He took care of the raw stores and material out of the boat bins and out of the stock bins that supplied the bronze and special screws and that type of stuff.

Q. Now, calling your attention to the period prior to the December hearing and during that period were you and Mr. Nichols pretty friendly?

A. Yes, sir.

Q. Was the same thing true as to you and Mr. Malamphey, Cliff Malamphey? A. Yes.

(Testimony of James Macon Davis.)

Q. Did either of them, at any time prior to December, find [350] any fault or criticize your work?

A. If they did I didn't know it.

Q. Did they ever criticize it to your face?

A. No.

Q. That is, neither one of them did, is that correct? A. That is right.

Q. With respect to the period after the hearing was your work—by that I mean your work personally—criticised or any fault found with it by either of the men I have mentioned?

A. Yes, I believe two different times.

Q. Would you tell us what those times were and the circumstances were?

A. About the following week after the trial was over Mr. Nichols found fault with a threading job I had done on some gear puller legs.

Q. Tell us what he said.

A. He said when I came in that evening and reported for work, he said, "Come here a minute. I got something I want to show you." He said, "These threads are off center." He said, "How could you account for that?"

I said I used a geometric head and if it is off center it was a head—it was an automatic threading head I used.

Q. Was that all there was to that discussion?

A. That is all there was to that one. [351]

Q. Was that Malamphey that told you that?

A. That was Ross Nichols.

(Testimony of James Macon Davis.)

Q. Had you ever cut any of those—what do you call that operation? A. Cutting threads.

Q. On what?

A. On round material. They were bearing puller legs, special bearing puller for the motor.

Q. Had you ever cut threads on a similar job before? A. Yes, sir.

Q. Had you ever been told the threads were off center by Mr. Nichols? A. No, sir.

Q. Or by Mr. Malamphey? A. No, sir.

Q. You said there were two instances in which your work was criticized? A. Yes.

Q. You have given us one? A. Yes.

Q. What was the other one, if you recall?

A. The other was a job of grinding on finning tools to cut the fins, tooling fins on cylinder barrels.

Q. What happened in connection with that?

A. He gave me the job, this particular job—I had never [352] liked the job much.

Q. Who is “he”?

A. Ross Nichols. And I never had liked that job very well. And I told Nichols in a joking way several times I hadn’t been very crazy about that job, grinding those tools. And he gave me a new way to do them, which I didn’t approve of the way, but I didn’t say anything.

Q. When you say “new” you mean a way you hadn’t been doing it?

A. It was a different way to grind it.

Q. It was different to you, is that what you mean by “different”? A. Yes.

(Testimony of James Macon Davis.)

Q. Go ahead.

A. I worked on those tools about a week, about six nights, I would say. And when I had them all finished the sizes were good, but the lines left from the grinding done this particular method were horizontal,—I mean vertical with the cutting edge, which wasn't good.

Q. You mean you didn't think so, is that what you mean?

A. Yes. And he asked me to take them to the surface grinder and grind those lines off, but hold the front edge to size, which was almost an impossibility.

Q. Now, when you said this method was new to you, had you ground these particular items in some other way in the past? [353]

A. Yes, sir.

Q. Did you tell him, or was it your opinion at that time that method which he suggested was improper or the wrong way to do it?

A. Yes, sir. I didn't tell him so, but I was thinking of it.

Q. That was your opinion?

A. That was my opinion.

Trial Examiner Spencer: Well, did he criticise this grinding job?

The Witness: He said that the finish on them wasn't good enough.

Trial Examiner Spencer: Is that all he said about it?

(Testimony of James Macon Davis.)

The Witness: That is all he said, yes, sir. To go and grind them on the surface grinder.

Q. (By Mr. Esterman): Now, you knew Mr. Sullivan, of course, when you worked at Kinner's?

A. Yes, sir.

Q. Were you, prior to the December hearing, and Mr. Sullivan pretty friendly?

A. Well, he always spoke and so did I any time we happened to meet.

Q. Did you see him quite frequently in the shop?

A. Yes, I saw him quite frequently.

Q. Daily or every other day or what? [354]

A. At least every two or three days.

Q. When you saw him you would speak to him and he would speak to you; is that right?

A. Yes.

Q. Now, with respect to Mr. Nichols and Mr. Malamphey and Mr. Sullivan, and with respect to the period between the hearing and the time you were laid off, did you personally notice any change in the attitude of any of them or all of them, with respect to whether they were still friendly, as you have just testified?

A. Oh, yes, I noticed quite a change.

Q. Would you explain your answer?

A. Mr. Nichols and I had, before the hearing, been very friendly, and I had done some work on his personal car and he and I also were talking about a little invention we were going to make for his type of car, fluid drive. He was very enthused

(Testimony of James Macon Davis.)

about this little item we had in mind. But after the hearing he quit—he had a changed attitude. He didn't talk to me freely or have anything in particular to say, outside of laying out the work. He didn't go out of his way to make any conversation, outside of giving out the jobs.

Q. The only things you discussed with him after the hearing were matters concerning your immediate work for Kinner's? A. Yes, sir.

Q. What was the situation with respect to Mr. Malamphey? [355]

A. There was quite a change in Mr. Malamphey.

Q. Would you explain that answer, please?

A. The following day, after Mr. Malamphey was on the stand here in the trial back in December, he approached me just after I came to work, and Mr. Gilpin was also with me. He said, "You guys didn't have any business bringing my name up down at the hearing." He was quite heated up about it.

Q. Tell us what he said, if he said anything.

A. He said, "You guys didn't have any business bringing up my name down at the hearing."

Q. Have you now explained your answer with respect to Mr. Malamphey?

A. That explains that conversation.

Q. Was he any more or any less friendly with you after the hearing, in your opinion?

A. He was a lot less friendly.

Q. I will ask you the same question with respect to Mr. Sullivan, with respect to the same period, that is, after the hearing.

(Testimony of James Macon Davis.)

A. After the hearing Mr. Sullivan, as I know, never spoke to me after the hearing.

Q. Did you ever pass each other in the plant?

A. About a week or maybe ten days after the hearing I met him face to face at the corner of the plant, between the front office or the administration building, as it is called, [356] and the shop, machine shop. He refused to speak, and even turned his head.

Q. You have mentioned, in your testimony, Mr. Davey. I think you said he was the works manager; is that right?

A. Yes.

Q. Were you and he pretty friendly before the December hearing?

A. Yes, sir.

Q. Did you see him in the plant from time to time?

A. I saw him practically every day.

Q. Did you speak to him and did he speak to you on those occasions?

A. Oh, yes.

Q. Did you notice any change in his attitude, so far as you were concerned, after the hearing?

A. Yes, sir.

Q. Will you indicate what you mean by that answer?

A. After the hearing I don't recall any conversation that I had with Mr. Davey.

Q. Did you have occasion to met him or see him just as frequently as you had before?

A. I saw him pass but he didn't even look my direction. Maybe he did look my direction sometimes, but if he did he didn't notice me. [357]

(Testimony of James Macon Davis.)

Q. (By Mr. Esterman): Calling your attention to approximately the early part of December, about two or three weeks before [360] the hearing, I will ask you if you had occasion to engage in a conversation with works manager Davey on the subject of your work? A. Yes.

Q. Who was present at that conversation?

A. Just Mr. Davey and myself.

Q. It was in his office?

A. It was in his office.

Q. Will you tell us what the conversation was on that subject?

A. I was in his office asking for a raise, and also asked for my availability, unless I could get more money for what I was doing, the job I was doing.

Trial Examiner Spencer: By "availability" you mean you sought a job release?

The Witness: Yes.

Q. (By Mr. Esterman): Go ahead, Mr. Davis.

A. And he was in a very good mood. He told me that he could, a little bit later, see that I was taken care of on the money end of the deal. He says, "Your work has been very satisfactory." And he says, "I have put you up as an example for some of the other fellows, showing the advancement they can get in Kinner's when they do their work and do it good." And he also said, "Your friend Gilpin is the best man I have got in the tool room." He said, "I don't know what I would [361] do without him."

(Testimony of James Macon Davis.)

Q. Calling your attention to the time just prior to the hearing——

Trial Examiner Spencer: Prior to the prior hearing?

Mr. Esterman: Yes, to the December hearing.

Q. (By Mr. Esterman): Did you aid the Field Examiner of the Board in obtaining any information or data in connection with the prior case?

A. I didn't understand that question.

Q. Did you help Mr. Ogren in connection with the preparation of the prior case?

A. I made testimony.

Q. You testified in the case?

A. I testified.

Q. How many nights a week were you working at the time you were laid off?

A. How many nights a week?

Q. Yes. What was the work week?

A. Six nights.

Q. How many hours a night?

A. Ten hours a night.

Q. How long had that situation been going on? How long had you had that kind of a week?

A. Around that 60-hour week, it started around in January, I believe, some time. [362]

Q. 1944?

A. I believe that is right.

Q. What had the work week been prior to January?

A. We worked—before that we worked three eight-hour nights and three ten hours nights.

Q. That would be 54 hours a week?

(Testimony of James Macon Davis.)

A. Yes.

Q. Did you at any time put in any overtime above the 60 hours? Did you at any time work over 60 hours a week?

A. Not for quite some time.

Q. Did you at any time work more than 60 hours?

Mr. Collins: I object to that as being incompetent, irrelevant and immaterial.

Q. (By Mr. Esterman): From the first of the year, until the time you left, did you ever work more than 60 hours a week?

A. No, I don't think so.

Q. Now, you and Swope and Gilpin, at least, as far as your working hours are concerned, were together constantly; were you not? You were together all the time?

A. Most of the time. Part of the time—some of the tool room equipment was located outside of the tool room. It was in the machine shop, but it belonged—it was really tool room equipment and was used as such. [363]

Q. Prior to the December 1943 hearing, did you know whether Mr. Sullivan was at all friendly with Gilpin and Swope?

Mr. Collins: I object to that as calling for a conclusion.

Q. (By Mr. Esterman): Upon your own observation.

Mr. Collins: That certainly calls for a conclusion; incompetent, irrelevant and immaterial.

Trial Examiner Spencer: I don't think it has

(Testimony of James Macon Davis.)

much weight. If you want to ask it, though, I will take it.

The Witness: As far as I know; I am not in a position to answer that.

Q. (By Mr. Esterman): You didn't observe whether they were or not?

A. No, I didn't know whether they were or not. I would like to add something to that.

Trial Examiner Spencer: He wants to add something to his answer.

Mr. Esterman: All right.

The Witness: On the question that was asked about hours.

Trial Examiner Spencer: All right.

The Witness: Whether we worked over 60 hours a week.

Trial Examiner Spencer: From January 1st to the time you were discharged.

The Witness: From January 1st? [364]

Trial Examiner Spencer: Or laid off.

The Witness: We didn't work any hours above the 60. The day crew went on seven days a week starting February 20th.

Q. (By Mr. Esterman): What had been the schedule on the day crew before?

A. Six days a week.

Q. Was that the situation when you left, that is, seven days on the day crew? A. Yes, sir.

Q. Is that what you wanted to add to your previous answer? A. Yes, sir.

Mr. Collins: I didn't just catch that. The reporter can read that.

(Testimony of James Macon Davis.)

Trial Examiner Spencer: Read it.

(The record was read.)

Trial Examiner Spencer: Proceed, Mr. Esterman.

Q. (By Mr. Esterman): Now, what has been your observation with respect to whether more different machines are in operation on the night shift or the day shift?

Mr. Collins: I object to that as incompetent, irrelevant and immaterial.

Trial Examiner Spencer: Do you know how many are in operation on the day shift? Have you observed it? Do you know it? [365]

The Witness: Yes, sir, I know the operation, and it is a much greater variety on the night shift than the day shift, owing to the fact there was only three of us on the night shift, to use all the machines in the tool room and there were 11 men on the day shift. That was more or less on one machine. In other words, we had a variety and worked our job straight through. And also part of the machines that belonged to the tool room were doing production work in the day time and were not available for the day crew, but were available for the night crew for highly precision grinding.

Q. (By Mr. Esterman): In connection with the tool work, you mean?

A. In connection with the tool work, highly precision grinding.

Q. Now, the function in general of the tool room is, is it not, to make and repair and main-

(Testimony of James Macon Davis.)

tain particular tools of various kinds that are used or set in a machine for the use in production in the machine shop; is that a fair statement?

A. Yes, sir. [366]

Q. (By Mr. Esterman): About how many people worked on the night shift on production or were working on the night shift on production at the time you left?

A. Well, let's see, I would say there was about nine.

Q. Do you know, from your own observation, how many there were on the day shift, working on production in the machine shop?

A. No, there were quite a number.

Q. More than nine?

A. Oh, yes. Yes; a lot.

Q. A great many more?

A. A great many more on the day shift than there was on the night shift.

Q. In your opinion, Mr. Davis, is it possible to operate the machine shop at Kinner's in Plant 1 on any shift without operating the tool room at the same time? [367]

The Witness: It is possible to operate the machine shop without the tool room. But there has to be some machine repair and tool work done somewhere, and they surely wouldn't do it in the production end of the shop, when there was a tool [368] room available. I think it is very necessary to have a tool room on the job to keep production going in war time.

(Testimony of James Macon Davis.)

Q. (By Mr. Esterman): Now, on a milling operation there is usually involved, is there not, a cutter of some kind that is made of special steel, special hardened steel; isn't that correct?

A. Yes, sir.

Q. Those cutters sometimes during the course of production will break, will they not, points come off?

A. Yes.

Q. Has that happened in your experience?

A. Yes; many times.

Q. Did your duties on those occasions include either the repair or tooling of new cutters?

A. Yes, sir.

Q. When you say many times, can you indicate how often that did happen while you were with the company, on your shift, I mean?

A. Cutter breaking on milling?

Q. Yes. [369]

A. I would say the period I was in the tool room it happened hundreds of times.

Q. Did it happen at least once a day?

A. Usually once or more times a day.

Q. When I say "day" I mean on your shift. Have you finished?

A. No.

Q. Go ahead.

A. The most of the companies have very few cutters, due to the shortage of material. [370]

Q. (By Mr. Esterman): During the time you were with the company is it your experience these cutters were repaired or sharpened—if I use the

(Testimony of James Macon Davis.)

correct term—by anyone not connected with the tool room work?

A. No special cutter. Grinding was done by any of the machine operators in the production.

Q. Who would usually do the cutter grinding?

A. Either Mr. Swope or Gilpin or myself. I did most of it.

Q. You did most of it?

A. I did most of the grinding. [371]

JAMES MACON DAVIS,

a witness called by and on behalf of the National Labor Relations Board, having been previously duly sworn, was examined and testified further as follows:

Direct Examination—(Continued)

Trial Examiner Spencer: You understand you are still testifying under oath?

The Witness: Yes, sir.

Mr. Esterman: I wonder if the company will stipulate that the personnel file so used by the company shows, with respect to James M. Davis, that a form entitled "Change of Status Notice," in that file, bearing the date November 29, 1943, and indicating a change of status with the effective date December 1, 1943, and indicating that the reason for the change is "Merit increase for superior quality work" and shows a wage increase from a basic rate of \$1.15 per hour to \$1.20 per hour in

(Testimony of James Macon Davis.)

each case, subject to the additional 5-cent night bonus.

Mr. Collins: Yes, I will so stipulate.

Mr. Esterman: Thank you.

Q. (By Mr. Esterman): What was your starting wage rate when you came with Kinner Motors?

A. It was either 60 or 65 cents. [375]

Q. Your change then from 60 or 65 cents, whatever it was, to your final rate—what was your final rate?

A. The final rate was \$1.20, plus five.

Q. That total change was the result, was it not, of periodic increases of small amounts, rather than one change?

A. Yes. They all came five cent raises, except one time I had a 10-cent raise one time.

Q. There has been something said on this record about blood donations. Were the employees of the company ever solicited for blood donations for the Red Cross while you were there?

A. Yes.

Q. On what occasion?

A. That was about May they solicited, and the donations were given on June 10, 1943.

Q. Were you one of the donors?

A. I was.

Q. Did you go down to the Red Cross from the plant?

A. I went to the Red Cross from the plant on company time.

Q. With the company's approval?

A. Yes.

(Testimony of James Macon Davis.)

Q. Was anyone with you?

A. Mr. Johnson, Brian C. Johnson, Mr. Ronnie Linkogle and there were three or four more. I don't remember their names. [376]

Q. All employees of the company?

A. All employees of the company.

Q. Since that time was there any request made by or through the company——

A. Not to me.

Q. ——for blood donations? A. No.

Q. Also, something was said on the record about authorization cards. I think your testimony was you passed out some cards to the employees of the plant.

Mr. Collins: I object to that as having been asked and answered.

Mr. Esterman: A preliminary question.

Trial Examiner Spencer: He has so testified.

Mr. Esterman: Yes. I am simply reminding him what he testified.

Trial Examiner Spencer: Proceed.

Q. (By Mr. Esterman): Did you deliver any signed authorization cards to the machinists union?

A. Yes.

Q. How many, and when, if you recall?

A. I gave seven, I believe, to Mr. Gabhart on or about the 10th of January, or the 12th; 10th or 12th of January, somewhere along about that date.

Q. Mr. Gabhart? [377]

A. Mr. Gabhart.

Q. Is that 1944? A. That is 1944.

(Testimony of James Macon Davis.) -

Q. Who is Mr. Gabhart? A. Beg pardon?

Q. Who is Mr. Gabhart, or was he?

A. He is the chairman for the I. A. M. in the Kinner's Plant 2.

Q. I don't believe the record shows, Mr. Davis, what the relationship is between Plant 1 and Plant 2. I mean with respect to how near or how far apart they are. What is the situation?

A. Plant 1 and Plant 2 are separated only by a narrow alley between. [378]

Q. Have you ever heard Gilpin and Swope and yourself referred to by anyone as the three musketeers? A. Yes.

Q. On what occasion and by whom, if you recall?

A. About two weeks before my termination I was going to the buffing room down the aisle of the machine shop, and I passed Mr. B. C. Johnson, and after I had gotten several [379] feet away from him I heard him say, "There goes one of the three musketeers."

Q. Did he say that to anyone there?

A. I believe it was Ronnie Linkogle; I wouldn't be positive about it.

Q. He did say it to someone?

A. Yes.

Q. To whom?

A. I believe it was Ronnie Linkogle.

Q. I also meant to ask you, Mr. Davis, with respect to your tool work, whether you were required

(Testimony of James Macon Davis.)

to work any particular tolerances; if so, what they were?

A. Yes, sir. In precision tool grinding or inspection gauge grinding we work within one-ten thousands of an inch.

Q. You say, "We." Do you mean you did?

A. Yes. And also Mr. Gilpin at times. He didn't do as much of that as I did.

Q. You say as much of that, do you mean precision grinding? Exactly what do you mean?

A. I had some inspection, precision inspection gauges to make during one period that required one-ten thousands of an inch precision.

Q. What are those gauges used for?

A. They are spherical radius gauges to inspect and gauge [380] the barrels made in Plant 2.

A. In other words, to check the quality of work on matters that have been produced on the production line? A. That is right.

Q. There has been some testimony about the War Manpower Commission hearing, which took place on or about March 3rd in Glendale. Or was it in Burbank?

A. It was in Glendale.

Q. Were you present at that hearing?

A. I was.

Q. Was there anything said by the panel chairman or any of the panel to Mr. Sullivan, in your hearing, on the subject of your discharge, with respect to whether or not you might have been put somewhere else in the plant? [381]

(Testimony of James Macon Davis.)

Q. (By Mr. Esterman): Do you recall the question, Mr. Witness?

A. No, I don't.

Mr. Esterman: Will you read it, please?

(Question read.)

The Witness: Yes.

Q. (By Mr. Esterman): What was said?

A. One of the panel asked Mr. Sullivan if he could have [382] put us on production, a production job. And Mr. Sullivan said, "Yes, I could have. But I didn't want to insult the boys by offering them a lower wage."

And he said, "Besides that, they came in after 5:30, after I had gone home and I didn't have an opportunity to say anything."

Q. Was that the extent of the interchange between the panel member and Mr. Sullivan at that time on that subject? A. Yes, sir. [383]

Q. Did the machinist union have a steward on your shift? A. Yes.

Q. Who was the steward?

A. I was the steward.

Q. Did you wear a steward's badge?

A. Yes, sir, I did.

Q. Do you have one with you?

A. No, I don't have it with me.

Q. Tell us what kind of a badge it was with respect to its size and color, if you know?

A. It is white. It is a white badge, about the size or maybe a little larger than a silver dollar, and it has the word "steward" in large letters,

(Testimony of James Macon Davis.)

block letters across the face of the badge. It has "International Association of Machinists" around the edge.

Q. Are you able to recall when you wore this badge at the plant?

A. I wore it continuously from about ten days before my termination.

Q. That is from about the 13th of February, 1944?

A. Yes, sir. [388]

Q. Were you wearing it when you were terminated?

A. Yes, sir, I was.

Trial Examiner Spencer: How many stewards were there? How many stewards did you have in the entire plant on your shift?

The Witness: On my shift I was the only one in Plant 1. They could have had some in Plant 2, but I don't know about that.

Q. During the time you wore your steward's badge, did you engage in a conversation with Mr. Cliff Malamphey on the subject of your steward's badge?

A. I did.

Q. Where did that conversation take place, if you recall?

A. In the tool room.

Q. With respect to your working hours, do you recall whether it was early in your shift or late, or when it was?

A. We were just—I had just come to work.

Q. Was Malamphey on the same shift?

A. Malamphey was on the day shift.

Q. Now, you stated that it was during the time you wore your badge. Are you able to fix the time

(Testimony of James Macon Davis.)

any better than that, with respect to when you were laid off?

A. That was about 10 days before my termination.

Q. Was anyone else present when you had this conversation, other than yourself and Mr. Malamphey? [389]

A. I remember Mr. Gilpin was there and probably some of the day crew. But I don't know exactly who was present.

Q. You can't name them now?

A. I can't name them, no.

Q. What was the conversation?

A. Mr. Malamphey looked at my badge, and says, "What you got there?"

I says, "You can read, can't you?" I held it up to him.

He says, "I thought you told me that you were against any unions when this union business first came up."

I said, "I was, but," I said, "if we went ahead and got a union, let's get a good one." And I said, "That is my choice."

He said, "I don't think much of a fellow that will say one thing and do another." That was the end of the conversation.

Q. Did you ever engage or were you ever engaged in conversation with Mr. Brian C. Johnson on the subject of Mr. Swope's work?

A. Yes, sir.

(Testimony of James Macon Davis.)

Q. Do you recall any particular instance or time when such a conversation took place?

A. I remember one, about, oh, probably six months before my termination, or around that time.

Q. Who was present at that conversation?

[390]

A. Mr. Swope and Mr. Gilpin and myself, and Mr. Johnson.

Q. Was this in Plant 1?

A. This was in Plant 1, near the tool crib.

Q. The tool crib is the same as the toolroom? Are you also referring to the toolroom when you say "tool crib"?

A. The tool crib is located practically in the center of the machine shop and supplies are issued through the tool crib, to the workers.

Q. Bearing in mind my preliminary question, as to what the subject of discussion was, will you tell us what the conversation was at that time?

A. The discussion was about different acts of production in the plant on the day shift and also on the night shift. And Mr. Johnson brought up that he remembered the time when Mr. Swope broke a production record in Plant 1 on the radial drill.

Q. Did he say what production record it was? Did he tell you what was involved in that record?

A. He said that Mr. Swope did so many of these parts and had them stacked in the aisle, finished work, he had done, you couldn't hardly get up and down the aisle.

(Testimony of James Macon Davis.)

He said, "I wonder what the day shift thought when they came on and saw that work."

Q. Did they say what parts they were?

A. Front covers, I believe. [391]

Q. Front covers for what?

A. Rear covers, it was. Rear covers it was; I am pretty sure.

Q. For airplane engines? A. Yes.

Q. Is that all you recollect of that discussion?

A. That is all I recollect of that discussion.

Mr. Esterman: No further questions.

Q. (By Trial Examiner Spencer): Mr. Davis, you have testified, I believe, to some extent as to the duties of Mr. Malamphey, Cliff Malamphey?

A. Yes.

Q. I would like a little more detail. Just what does Mr. Malamphey do?

A. Mr. Malamphey is assistant to Mr. Ross Nichols, who is foreman on the day shift.

Q. Have you had any opportunity to observe just what Malamphey does? A. Yes, sir.

Q. Describe his duties.

A. His duties are—he is acting foreman while Mr. Nichols is out of the plant or away on vacations, and so forth, and during the time Mr. Nichols is there he assists him in issuing jobs, also in making out requisitions for stock issued out of the steel room—we call it—or the the room where [392] all the material is issued.

Trial Examiner Spencer: Do you have any cross examination?

(Testimony of James Macon Davis.)

Cross Examination

Q. (By Mr. Collins): You say, Mr. Davis, that you are working now? A. Yes, sir.

Q. When did you start working presently?

A. I started, I believe, March 6th.

Q. March 10th? A. 6th.

Q. March 6th? A. Yes.

Q. Where was that?

A. Bendix Aviation Corporation.

Q. Where?

A. I believe that is 11600 Sherman Way, North Hollywood.

Q. That was March 6th. And what do you receive there? A. \$1.20 plus five.

Q. Have you received that continuously?

A. I have.

Q. Beg pardon? A. I have.

Q. How many hours have you worked a week?

A. I have worked eight hours a day. [393]

Q. You have been receiving the same pay for how many days a week?

A. For six days a week; eight-hour days.

Q. You have been receiving then the same pay per week you were receiving at Kinner's?

A. Per hour, yes, but not in time.

Q. What was the difference?

A. I worked ten hours at Kinner's; six days a week.

Q. Do you get paid at Bendix on the basis of ten hours? A. I beg your pardon.

(Testimony of James Macon Davis.)

Q. Do you get paid at Bendix on the basis of ten hours because it is a night shift?

A. No.

Q. You only get paid on the eight?

A. No. I am on the second shift, which receives a five cent bonus. The third shift receives the same. They only work six hours but they receive pay for eight hours. That is on the graveyard, they call it, or the third shift. [394]

Q. When was the first time that you knew you were laid off for the reason given by the company that there was lack of work on your shift?

A. I beg your pardon?

Trial Examiner Spencer: Read the question.

(The question was read.)

The Witness: The girl in the personnel office read from some paper on her desk I didn't see, except to know it was just a paper she was reading from. She said "This slip says 'layoff, lack of work'."

Q. Your testimony on direct examination was that no one told you at the time of the layoff you were being laid off for lack of work; is that correct? [400]

Mr. Esterman: I object. That wasn't his testimony.

Mr. Collins: The Trial Examiner remembers, and that was his testimony.

Trial Examiner Spencer: The record will show, if there is a conflict.

(Testimony of James Macon Davis.)

Q. (By Mr. Collins): Is that correct, if you so testified?

A. I testified this girl said, when we went into the personnel, "This slip says, 'layoff, lack of work.'" [401]

Q. You have heard the testimony here concerning the question of War Bonds. Did you ever participate in any conversations with any of the employees of Kinner Motors in relation to War Bonds?

A. I probably have.

Q. Who? A. Mr. Dayhoff, I believe.

Q. Who else?

A. He is the only one I know of positively.

Q. Can you remember any other people that you discussed it with?

A. I don't believe I can.

Q. You can't remember another person?

A. I can't remember anyone else positively.

Q. You had quite a few talks with quite a few people about War Bonds?

A. Maybe I did, but I don't remember them.

Q. You don't remember that matter. What do you mean, "Maybe you did"?

A. I have had a lot of talks about a lot of different things that I don't remember.

Q. I am asking you if you had a talk about a very [403] important subject to our country, about War Bonds?

Mr. Esterman: I object. The question has been asked and answered several times.

(Testimony of James Macon Davis.)

Mr. Collins: I have had the most elusive kind of answers.

Mr. Esterman: I object to that statement. I think the answers have been clear and unmistakably responsive.

Trial Examiner Spencer: I will sustain the objection. I think he has answered repeatedly. I think his answer is he may have but he doesn't recall the conversations with employees about War Bonds, except the conversation he had with Mr. Dayhoff.

Is that your testimony?

The Witness: That is right.

Q. (By Mr. Collins) What did you say to Mr. Dayhoff?

A. I remember one conversation I had with Mr. Dayhoff when I said that I didn't believe in tying up all the money that a man had in War Bonds, because they might be frozen at any time and he wouldn't have the opportunity to get necessary money in case of sickness or so forth.

Q. What else did you say?

A. I said I believed, my personal belief was we should give our money and go into total conscription.

Q. Did you say anything about you thought the Bonds might be worthless? [404]

A. Not that I recall, no, sir.

Q. Do you mean by that you can't remember whether you did or didn't or that you didn't say it?

A. I said that it was possible that the Govern-

(Testimony of James Macon Davis.)

ment debt would get so big they couldn't pay off. I didn't say they would. I said it was possible.

Q. To whom did you say that?

A. I said that to Mr. Dayhoff.

Q. How many other people?

A. Mr. Dayhoff is the only man I remember making that statement to.

Q. You say you may have had talks with other people. If you talked to other people in the plant you said about the same thing; didn't you?

A. I don't remember any talks that I had with other people.

Q. Did you ever hear Mr. Gilpin have talks with other people?

A. I heard him have a talk with Mr. Shaw and a lady with Mr. Shaw in the Bond drive.

Q. Who was the lady?

A. I don't remember the lady.

Q. All right. What did he say to them?

A. Who, Mr. Gilpin?

Q. Yes. [405]

A. Mr. Gilpin told Mr. Shaw that he didn't believe in buying Bonds for a profit when the boys were shedding blood in Europe free and giving their lives.

Q. Did he say he didn't believe it was right to buy Bonds under those circumstances?

A. He says, "I believe we should give the money to the Government. The boys are giving their lives. Why shouldn't we give our money?"

(Testimony of James Macon Davis.)

Q. Did he say he didn't believe it was right to buy Bonds under those circumstances?

A. He said that and he added because of the fact that the boys were giving their lives and we should give the money.

Q. Did he say anything about the fact that the United States has chosen this method of financing the war, and that is the only method available? Did he say how we were going to finance the war if all the people had that same feeling?

Mr. Esterman: Do you mean did Gilpin say that?

Mr. Collins: Yes.

The Witness: I don't recall a statement like that.

Q. (By Mr. Collins): Did he say something, in substance, about like that?

A. I don't remember.

Q. Did anybody say to you and Mr. Gilpin, "How are you going to finance the war if all people of your kind have views on this thing"? [406]

A. I believe Mr. Gilpin testified——

Q. We don't want his testimony now. We want what was said.

A. I don't know anything about it.

Q. Was it said?

A. I don't recall that statement. It could have been said.

Q. Did Mr. Gilpin say anything about the Bonds being worthless?

Mr. Esterman: What is the question?

Q. (By Mr. Collins) Did Mr. Gilpin say to Mr.

(Testimony of James Macon Davis.)

Shaw and this lady anything about the Bonds being worthless?

A. Did he tell Mr. Shaw that the Bonds might be worthless?

Q. Yes. A. No, sir. He did not.

Q. Did he discuss the fact they might be worthless?

A. No, sir, he did not. I related the full conversation between Mr. Gilpin and Mr. Shaw.

Q. What was that full conversation?

A. That full conversation was Mr. Shaw asked Mr. Gilpin if he wanted to buy extra War Bonds. Mr. Gilpin says, "No, I don't want any extra War Bonds."

He said, "I don't believe in buying War Bonds for a profit when the boys in Europe are shedding their blood and giving their lives free." [407]

RICHARD ARTHUR SWOPE

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Q. (By Mr. Esterman) State your full name and address.

A. Richard Arthur Swope, 623 East Athens, Altadena. [418]

Q. Where are you employed, Mr. Swope?

(Testimony of Richard Arthur Swope.)

A. I work at the Standard Machine Works, 88 North De Lacey, Pasadena.

Q. In what capacity?

A. I am working as an all around machinist, doing work on anything they happen——

Q. I can't hear you. You will have to talk a little louder.

A. I am doing all around machine work on any machine they happen to have.

Q. On what shift?

A. Second shift; they only run two.

Q. Would that be the same as the night shift?

A. Swing shift.

Q. Starting and finishing when?

A. Starting at 4:30 and running through until 2:00 in the morning at present.

Q. You say "at present". Was it different?

A. Yes, when I went to work.

Q. When did you go to work for that company?

A. I went to work February 29th. I believe either that or I applied February 29th and went to work the following Monday.

Q. What was your wage rate? You are there now? A. Yes. [419]

Q. Have you been there continuously since that time? A. All but two weeks.

Q. What happened then?

A. My tools were stolen. The shop was broken into my tool box was stolen. I left for a couple of weeks while they were attempting to recover my

(Testimony of Richard Arthur Swope.)

tools. Then I came back and had to buy a new set of tools to resume work.

Q. When were you absent? Fix the time, if you can.

A. It was the first part of March.

Q. Except for that absence you have been there continuously?

A. Yes, that is right.

Q. At what wage rate did you start?

A. \$1.15.

Q. With any night bonus?

A. The night bonus was 5 percent.

Q. Is it any different now? A. No.

Q. That is what you are getting now?

A. Yes.

Q. 5 percent night bonus?

A. 5 percent night bonus.

Q. In addition to your \$1.15?

A. Yes. At the present time I am getting my base pay which is \$1.25 plus six cents night bonus.

[420]

Q. That is the present method of payment?

A. Yes.

Q. When did that take effect, if you know?

A. I have been getting raises every four weeks. They considered my work good enough to merit a raise every four weeks after the first two weeks, which give me my first raise.

Q. What were you raised from to?

A. From \$1.25 to \$1.31.

Q. Were you raised after that from \$1.31?

(Testimony of Richard Arthur Swope.)

A. I don't exactly understand what you mean, after what?

Q. What is your present wage rate?

A. \$1.31.

Q. Was your increase from \$1.105 to \$1.31 all at one time or in stages?

A. A nickel at a time.

Q. Thank you. Does \$1.31 include the 6 cents——

A. It does.

Q. Thank you.

A. The base pay being \$1.25. After \$1.20 it becomes 6 cents until it reaches \$1.35 at which time it becomes 7 cents.

Q. You are saying the bonus for night work is 7 cents when your base rate is higher?

A. Yes. The higher it goes the more night bonus you [421] receive.

Q. Thank you. Now, you started to work for Kinner when?

A. June 28, 1940.

Q. Did you work for the company continuously until February 19, 1944?

A. I did.

Q. Except for a vacation, I take it.

A. Except for one week vacation once a year.

Q. You didn't work for anyone else during that period?

A. No, I didn't.

Q. What was your next previous employment prior to June 28, 1940?

A. I worked for David Barnes. That was intermittent work in a mining district in Northern California; the repair and maintenance of mining machinery, including welding and mechanical work.

(Testimony of Richard Arthur Swope.)

Q. For how long did you work for Barnes?

A. I lived in that country for approximately 10 months, and off and on during that time, whenever it was required, I worked on his machinery. That was not continuous because due to weather conditions the mine was not run—it was a more or less of a prospect project. [422]

The Witness: That was kind of a prospect project. They were drilling. They were using a diamond point drill to take test cores out of the ground.

[423]

Q. Thank you. What was your wage rate when you started with Kinner? A. 50 cents.

Q. An hour? A. Yes; that is right.

Q. What was it when you left?

A. \$1.00; 95 plus five cents night bonus.

Q. Would you tell us, with respect to the time you worked at Kinner's, what you did when you started, what progressive changes were made in your work with respect, not only to the work but your shift. Simply give us the facts, the dates and the changes in jobs, as briefly as you can?

A. As far as giving the dates and the changes in jobs, the jobs ran in such a way it would be impossible to do that because one night we might be working on one thing, the next night we might come in and work on three or four things in a night. I started out on a drill press, single spindle [425] upright drill press, drilling and reaming valve guide holes in cylinder heads. From there I went to va-

(Testimony of Richard Arthur Swope.)

rious drilling operations on other parts, including cylinder barrels and cylinder heads. And then I did various operations on milling machines. Then I worked on the Sted threading machine for something like five months. During that time, when the job on the machine would run slack, I did milling machine work. Then I went on the radial drill and I worked quite some time. I don't know exactly how long. It was well over a year. That was on the radial drill, doing all operations except the boring machine operation and some milling machine operations on the rear covers. Some of the operations ran into as many as fifty different complete changes in tools on each part. I worked on that up until the time I went in the toolroom.

Q. When did you go into the tool room, Mr. Swope?

A. I think it was in August, 1943.

Q. There you remained until you were laid off in February, 1944?

A. I remained there until I was laid off in 1944, February 15th was my last working day.

Q. Have you operated both vertical and horizontal milling machines at Kinner's?

A. Yes, I have.

Q. Have you operated grinders? [426]

A. Grinders, both internal—I mean not internal. I don't mean that. I didn't operate the internal. I operated the combination, internal and external Cincinnati, Philamatic on external work only. Also the Cincinnati tool grinders and another tool grind-

(Testimony of Richard Arthur Swope.)

er, I don't know what the name was. I never paid any attention.

Q. Did you work on the shaper at Kinner's?

A. I worked on the shaper, both shapers they had there at the time, the Cincinnati and the G. and E.

Q. There was a machine mentioned called a lateral, I think. Have you worked on that machine?

A. That is right. That is a Sunnen bushing lapper.

Q. What is the operation, just briefly?

A. It is to lap micrometrically the internal dimension of any bushing, as close as to one-ten thousandths of an inch.

Q. I don't know whether I know any more now about it than I did.

Have you done any work on a threader?

A. That is right.

Q. Is that a machine?

A. That is a stud threader for automatically putting the threads on the studs to a definite length of thread. It was a Landis machine.

Q. Have you worked on lathes at Kinner's?

A. Both bench lathe and engine lathe. [427]

Q. Your answer is you have? A. Yes.

Q. Did Kinner's, while you were there, have any power driven metal saws?

A. They had one in Plant 2. I had occasion to use it.

Q. You worked on it? A. Yes.

(Testimony of Richard Arthur Swope.)

Q. Did you do any welding when you were with the company? A. I did. [428]

Q. Will you relate the circumstances under which your change of status into the toolroom came about? And by that I mean who was responsible for it, if you know, or who told you you were being transferred? Do you understand that?

A. Yes. I came in early, about 11:00 o'clock in the morning, if I remember right, and went over to the personnel to see Mr. Sullivan about a part time availability to go to work four hours a day somewhere else, at which time I asked him why I wasn't getting more money in proportion to the work I was doing.

He said I had reached the top on my classification of work. So I told him at that time I wanted my release or another job where I could make more money. He said that he would contact Mr. Davey and see what he could do. That evening when I came in I was told to go to Mr. Davey's office. I went there and his secretary—I didn't see Mr. Davey personally—his secretary told me to report to Clifford Malamphey who, at the time, was taking Ross Nichols' place, who was on vacation. On reporting to him I was told [433] what job I was to do and the machine I was to operate, which was an engine lathe, a Monarch, and given the work and told to go ahead and do it.

Q. Was Gilpin working in the toolroom on that shift when you went into the toolroom?

A. He was.

(Testimony of Richard Arthur Swope.)

Q. Was Jim Davis working in the toolroom at that time? A. That is right.

Q. Calling your attention to the evening of February 16, 1944, did you go to work as usual on that night? A. Yes, I did. I came——

Q. Just answer the question. What, if anything, occurred?

A. You mean from the time I arrived at the plant?

Q. Yes.

A. The first thing I did I went in, naturally, and punched my card, which was in the rack. I went on into the shop and talked to the lathe operator on the shift, the day shift, and he was explaining what was left on the job that we were doing. Then I was approached by Ross Nichols.

Q. All right. Mr. Nichols said something to you?

A. Yes. He stood until we were finished talking, and then, as I walked away from Mr. Calhoun, who is the engine lathe operator in the toolroom for the day shift, he stopped me and told me that there was no further work and I should get my checks and get a tool release. [434]

Q. Nichols told you that?

A. That is right. So I went and got my checks out of my tool box and we went together to the tool crib where Mr. Harry Payne authorized the tool release for me. He was the tool crib man.

Q. What was said between you, if anything, and

(Testimony of Richard Arthur Swope.)

Mr. Nichols at that time with respect to your being laid off?

A. At that time nothing was said. He left and I went ahead and got my tools together and rolled them out to the front gate where they could be picked up.

Q. Did you ask him why you were being laid off?

A. I didn't ask him that until later.

Q. How much later?

A. I should say about an hour and a half later, between an hour and an hour and a half. I was waiting in the clock room to get through, a call through to my wife to bring the car down so I could pick my tools up.

Q. Did he give you any reason for the layoff?

A. I asked him why, in such a case, he must have known there was a shortage of work that he did not give me at least a couple of day's advance notice that I was being laid off, so I wouldn't have caused the inconvenience it did as I *to* wait at the plant from the time the shift changed until well after dark for my wife to come down to get the car, which was something like 12 to 14 mile drive for her. [435]

Q. What did he say?

A. Well, he said, "One never knows. Things are changing rapidly and one never knows what happens from one day to the next."

Q. Is that all he said that you remember?

A. That is all he said.

(Testimony of Richard Arthur Swope.)

Q. He didn't say anything else at that time?

A. No. He wouldn't say anything else.

Q. Now, did you go back for your check?

A. I had no idea when I would be able to get it, other than the regular pay day, because previous to that other employees——

Q. Did you go back on the regular pay day?

A. Yes.

Q. When was the next pay day?

A. It would come on Sunday, so it was set ahead to Saturday which was the 19th. The reason I didn't go back before that was because other employees had been told to come on the regular pay day for their final checks.

Q. You went back for your pay check. Did you go to the personnel office? A. Yes, I did.

Q. Whom did you see there?

A. I saw and talked to the girl that issues the temporary passes. She was the one that gave me my check. The entire stuff that was handed to me, you know, availability certificate [436] and termination notice and all the stuff was pinned together; that came with the check.

(The documents referred to were marked as Board's Exhibit No. 12 for identification and received in evidence.)

(Testimony of Richard Arthur Swope.)

BOARD'S EXHIBIT No. 12

Deliver This Copy to the Worker at the
Time His Services Are Terminated

Use This Form Only for Reporting Termination
of Service Involving Possible Disqualification
Social Security account number of worker 548-
26-6968

Name of worker: Richard A. Swope.

Date of this notice 2-17-44

Last date individual worked 2-16-44

Date employer was informed of workers termina-
tion of service if other than date entered in the
preceding item.....

Employer's name and address must be typewritten
or entered in ink

Kinner Motors, Inc.
635 W. Colorado Blvd.
Glendale 4, California

Do Not Ask the Worker to Sign This Form
Instructions for the Worker Appear on the Reverse

Termination Notice Concerning
Possible Disqualification
Cause of Termination of Service

Check item 1, 2, 3 or 4, or state the cause of sepa-
ration under item 5. Present full explanation under
item 6:

- 1 ☐ Left voluntarily
- 2 ☐ Discharged for misconduct connected
with his work
- 3 ☐ Worker not able to work

(Testimony of Richard Arthur Swope.)

4 () Worker not available for work

5 () Other cause Laid off—Termination of Contract.

6 () Explanation

I Certify That the information given on this form is true and correct to the best of my knowledge and belief.

By E. J. SULLIVAN M

Signature of individual completing this notice

California Department of Employment Affiliated with Social Security Board

Instructions to Worker for Use of Termination Notice Concerning Possible Disqualification

As soon as possible, take this notice to the local employment office in the vicinity in which you live. If there is no United States Employment Service office in your town write the nearest office, asking when and where you can consult a representative of the Department of Employment. It is important that you do this immediately, regardless of possible disqualification.

Do Not Destroy This Notice. Your employer is required to give it to you under the Regulations of the California Employment Commission.

If you file a claim for unemployment insurance or if you renew or continue a claim which was previously filed, Present This Notice at the time of registration for work and filing of a claim.

You will be ineligible for unemployment insur-

(Testimony of Richard Arthur Swope.)

ance if the California Department of Employment determines that:

1. You quit your job without good cause (2 weeks ineligibility), or
2. You were discharged for misconduct connected with your most recent work without good cause (1-6 weeks ineligibility), or
3. You wilfully made a false statement or representation or wilfully failed to report a material fact to obtain unemployment insurance (4 weeks ineligibility).

You can not collect unemployment insurance when you are sick and unable to work.

If, without good cause, you refuse suitable employment when offered to you, or fail to apply for suitable employment when notified by the United States Employment Service office, you will be ineligible for unemployment insurance.

Failure to present this notice when filing a claim for unemployment insurance may result in a serious delay in the determination of your insurance rights.

Warning: It is not necessary to employ anyone to help you collect benefits; someone in the local employment office will help you.

Q. Now, when you went back for your check to the personnel office, was Mr. Sullivan there?

A. Mr. Sullivan was in the main lobby of the personnel office. I stood within five feet of him.

(Testimony of Richard Arthur Swope.)

Q. Did he speak to you?

A. No, he did not speak. He turned his back. He looked [438] at me and turned around to the girl that was getting something from the files for him.

Q. You heard the testimony concerning a hearing before the War Manpower Commission on or about March 3rd; did you not?

A. That is right.

Q. Were you present at that hearing?

A. I was.

Q. Did you hear a conversation between Mr. Sullivan and one of the panel members with respect to whether or not you or Gilpin or Davis had been offered or could be offered work in the plant?

A. I did.

Q. Did you hear that conversation?

A. Yes.

Q. Relate it as well as you can remember it?

A. He asked——

Q. Who?

A. The panel chairman asked Mr. Sullivan at the time why we had not been offered other positions. Mr. Sullivan said apparently we avoided seeing him at the time that we left, for some reason that he didn't know.

Q. Just tell us what he said.

A. So he couldn't——

Q. Tell us what he said.

A. So he couldn't offer us the other position. And that was [439] about all I remember of that conversation.

(Testimony of Richard Arthur Swope.)

Q. Thank you. Calling your attention to the prior case in which there was a hearing in December, 1943, did you aid or assist in the obtaining of any information in connection with the presentation of that case?

A. Anything I could find in the form of bulletins that were posted or any material in the Kinner Log, which was the Kinner newspaper, or anything I could present to Mr. Davis of any value to him I did at the time, in the way of not taking the bulletins but just copying the material.

Q. Do you know whether any foreman or representative of management knew that you were active in the manner in which you have just described?

A. I am sure Mr. Johnson did. [440]

Q. You have mentioned Mr. Nichols. Were you and Mr. Nichols pretty friendly before the hearing in December?

A. We got along just fine. I should say I never had any words with him or anything to indicate that we were not friendly.

Q. Did you notice any change in his attitude after the hearing? Just answer yes or no.

A. I would say yes.

Q. Would you explain your answer?

A. We used to always discuss the work thoroughly before we went into it. He usually called us over to his desk and discussed it so there would be no slip-ups in the job. After that his orders were quite short and no personal conversations were had with him after that; and fault was found

(Testimony of Richard Arthur Swope.)

with the work in one or two cases. And just a general change in [444] attitude was noticeable at the time. [445]

Q. There has been some testimony about conversations which took place, testimony by Mr. Davis, about a conversation that took place he said about six months before Davis was terminated, in which there was a discussion with Mr. Johnson on the subject of your work. You heard that testimony; didn't you? A. Yes.

Q. Do you recall that conversation?

A. Yes. Do you want to know what the job was about?

Q. Wait until I ask the questions. Do you recall the conversation? A. Yes, I do.

Q. Were you present? A. Yes.

Q. Who was present, according to your recollection?

A. Mr. Gilpin, Mr. Davis and myself, and Mr. Johnson.

Q. Where did that discussion take place?

A. Somewhere near the window, I would say, where the tools were issued from the tool crib. That would be right in front of the Norton grinder that sits there.

Q. In Plant 1? A. In Plant 1.

Q. On the night shift?

A. On the night shift.

Q. What was said in that conversation on the subject of your work?

A. There was the subject of promotion brought

(Testimony of Richard Arthur Swope.)

up, and Johnson mentioned the night that I turned out the rear covers on this operation, this particular operation. Previous to the time I went on the job a 10-hour night was a [449] good night when they turned seven out.

Q. Are you telling us what Johnson said?

A. I am telling us what occurred, what caused Johnson to say that.

Mr. Collins: I move to strike it. Let's try to keep to the question.

Mr. Esterman: I am trying to do the same thing.

Mr. Collins: I know you are.

Q. (By Mr. Esterman): Tell us what was said at that time. If I want to know anything else, Mr. Swope, I will ask you.

A. He said that the aisle was blocked with work the next day when the day shift came on, and that the day man, of course, was surprised to see that amount of work turned out.

Trial Examiner Spencer: Turned out by whom?

The Witness: By myself.

Q. (By Mr. Esterman): Now, what particular job was he talking about, did you know at the time?

A. Yes, I did.

Q. What part or parts did the job involve?

A. It involved the drilling and reaming of cam and mag boss holes in rear covers, something like 50 or so operations on the job on each part.

Q. Does your recollection serve you as to how

(Testimony of Richard Arthur Swope.)

many you turned out on the particular night Johnson was talking about? A. I did. [540]

Q. How many did you turn out?

A. I turned 20 out that night.

Q. In your experience, what was the most that had been turned out before that by anyone else?

A. A good 10-hour night's work, if you didn't have any trouble, was seven.

Q. (By Mr. Esterman): Did you ever give the Machinists Union a bargaining authorization?

A. I think I gave them at least two.

Q. Indicate when, if you can?

A. One was back about July of 1943. The last one, I am pretty sure, was on the 11th of February, I believe, of 1944.

Q. Did you wear any union buttons on the job when you were [451] with Kinner's?

A. Yes, I did.

Q. When, if you recall?

A. I most generally always had the button on when I came in to work; quite often I had one on my shirt I wore while working. I always wore it on the top of these (indicating) either one of these two pockets on this very shirt when I came in. It was commented on.

Q. Well, first, tell me when you started wearing the button, approximately?

A. I would say in December some time, in 1943.

Q. What did you mean by your statemnt "It was commented on"?

A. Mr. Alf Graflex—

(Testimony of Richard Arthur Swope.)

Q. Mr. Graflex said something about it?

A. Yes.

Q. Who he is?

A. He is an engine lathe operator in the tool room.

Q. Was anyone else present when he said it?

A. Yes. [452]

Q. (By Mr. Esterman): Did you ever make any statements in the plant at Kinner's on the subject of war bonds to other employees?

A. Only when I was asked about what I thought of them, or approached.

Q. Were you asked? A. Yes, I was.

Q. By anyone whose name or identity you can give us? A. Mr. Dayhoff had mentioned——

Q. Just a moment. Wait until I ask the question. It will be helpful.

A. I was doing that. I just said Mr. Dayhoff had mentioned the subject.

Q. Thank you. I was about to ask you if you recall when your statement to Dayhoff was made, approximately?

A. I would say some time in January, 1944.

[454]

Trial Examiner Spencer: Who spoke first about war bonds, you or Dayhoff?

The Witness: Dayhoff.

Trial Examiner Spencer: What did he say?

The Witness: I don't remember what he said exactly. I know what I said, naturally.

Trial Examiner Spencer: What did you say?

(Testimony of Richard Arthur Swope.)

The Witness: I told him that—asked him how long he thought it would take us to make up the amount of money that was released for this certain thing that I have been told not to mention here.

Q. (By Mr. Esterman): I didn't say you shouldn't mention [455] it. I want you to tell it. If you mentioned it in your statement to Mr. Dayhoff, mention it now, because you are relating the conversation. If you mentioned a newspaper to him, you can certainly mention it. We want you to tell us what you said and what he said.

A. About this piece in the paper, about the three and a half million dollars being allowed to the Treasury Department for advertising on war bonds, I asked him how long he thought it would take us at Kinner's to make that amount up, that was spent not in furthering the war effort in the way of buying materials to help the boys that were fighting, and asked him at the time if he didn't think it would be more practical to forget about the advertising since they were taking the money out of our check, let them take the money and spend a hundred per cent of it on the purchase of war materials, and forget about the three and a half million dollars for advertising.

Q. Are you referring to something you saw in a newspaper? A. That is right.

Q. Have you given us the substance of what you saw in the newspaper?

(Testimony of Richard Arthur Swope.)

A. Yes. What I saw was the release of three and a half million dollars for advertising.

Q. Did he say anything?

A. He didn't have anything to say about that.

Q. Do you know how that conversation started?

A. No, I don't exactly.

Trial Examiner Spencer: Is that all you said about war bonds during that conversation?

The Witness: That is all.

Q. (By Mr. Esterman): Do you recall the identification or names of any other persons with whom you discussed war bonds at Kinner's?

A. No, I don't.

Q. Did you talk with persons about war bonds whose names you don't remember?

A. Only, naturally, Mr. Davis and Mr. Gilpin.

Q. You discussed war bonds with them?

A. They are the same identical things I told you in my statement here.

Q. You discussed this same subject with Gilpin and Jim Davis? A. That is right.

Q. Because you had seen it in the paper that day? A. That is right, yes.

Q. Did you ever tell anybody it was a waste to buy war bonds?

A. Absolutely not. I was buying them myself.

Q. All right. Did you participate in a payroll deduction plan for the purchase of bonds?

[457] A. I did.

Q. To what extent if you know?

A. I was getting a bond every time they came

(Testimony of Richard Arthur Swope.)

around with them, which was once a month. I believe on the 20th of each month they brought them out.

Q. What denomination? A. \$25.00. [458]

THEO SINES

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Q. You have seen quite a few people wearing buttons, Machinists buttons there, haven't you, in the plant? A. Yes, I have.

Q. You have never heard anybody tell them to take them off? A. No.

Q. You are still employed there?

A. Yes, that is right.

Q. They are still working there in large numbers; are they not? A. Yes.

Q. Have you ever heard anybody from management tell them to take off the union buttons?

A. No. [475]

(The documents referred to were marked as Board's Exhibits No. 13 and 8 for identification and received in evidence.)

(Testimony of Theo Sines.)

BOARD'S EXHIBIT No. 13

KINNER MOTORS INC.

KINNER

635 West Colorado Boulevard

Glendale, California, U. S. A.

Please Address All Correspondence to Kinner

Motors Inc and Reply in Duplicate

Telephones Los Angeles Chapman 5-1021

Glendale Citrus 3-3141

Cable Address Kinco

Bell System

Teletype Writer Service

Glendale 7078

February 22, 1944

Mr. John Eaton

635 West Colorado Blvd.,

Glendale 4, California

Dear Sir:

Kinner Motors, Inc. regrets exceedingly that it has now become necessary to terminate your employment with the Company, for the reason that your physical qualifications do not reach the standard which the Company must now maintain on its guard forces. I am sure that you realize for a long time past the Company has attempted to avoid this, but regrets it cannot do so any longer.

We are, therefore, notifying you officially that

(Testimony of Theo Sines.)

your employment will terminate as of the last day of February 1944.

Yours very truly,

KINNER MOTORS, INC.

E. J. SULLIVAN

E. J. Sullivan

Personnel Manager

EJS:eas

BOARD'S EXHIBIT No. 8

United States of America

Before the National Labor Relations Board

Trial Examining Division

Washington, D. C.

In the Matter of

KINNER MOTORS, INC.

and

INTERNATIONAL ASSOCIATION OF MA-
CHINISTS, DISTRICT LODGE No. 94, for
and on behalf of LODGE No. 311, AFL

Mr. Daniel J. Harrington, for the Board.

Mr. Victor Ford Collins and Mr. James S. Wolla-
cott, both of Los Angeles, Calif., for the respondent.

Messrs. Pearson & Proctor, by Mr. Marlan
Proctor, of Burbank, Calif., for the Association.

Mr. Roscoe Ickes, of Los Angeles, Calif., for
the Union.

Board's Exhibit No. 8—(Continued)

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon a charge duly filed on May 15, 1943, by International Association of Machinists, District Lodge No. 94, for and on behalf of Lodge No. 311, affiliated with the American Federation of Labor, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the twenty-first Region (Los Angeles, California), issued its complaint on November 26, 1943, against Kinner Motors, Inc., Glendale, California, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (2) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and the charge, with notice of hearing thereon, were duly served upon the respondent, the Union, and upon Kinner Motors Employees Association, Inc., the labor organization alleged in the complaint to be company-dominated, and herein called the Association.

With respect to the unfair labor practices, the complaint alleged, in substance, that from about February 1942, to the date of the issuance of the complaint herein, the respondent has expressed to the employees its opposition to any labor organization **except an employer-dominated organization**; that on or about March 15, 1943, the respondent inaugurated, sponsored, promoted, and formed the

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Association among its employees and at all times since that date has: 1) dominated, and interfered with the administration of the Association; (2) contributed financial and other support to it; (3) solicited and advised its employees to join it; and (4) attempted by means of threats to persuade its employees to become members thereof; and that on or about June 16, 1943, the respondent entered into a written collective bargaining agreement with the Association as the exclusive representative of the employees which agreement was in full force and effect at the time of the issuance of the complaint herein.

On or about December 6, 1943, the respondent filed an answer admitting all the allegations of the complaint pertaining to the existence of the respondent and the nature, character, and extent of the business transacted by it, as well as the allegations that the Union and the Association are labor organizations within the meaning of the Act and that it did, on or about June 16, 1943, enter into a written collective bargaining agreement with the Association as the exclusive representative of its employees. The answer denied, however, all the allegations of the complaint with reference to the engagement by the respondent in any unfair labor practices.

Pursuant to notice, a hearing was held on December 13, 15, 16 and 17, 1943, at Los Angeles, California, before Howard Myers, the undersigned Trial Examiner, duly designated by the Chief Trial

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Examiner. At the opening of the hearing, the Association moved to intervene. The motion was granted without objection. Thereafter the Association filed an answer denying, among others, the allegations of the complaint that the respondent inaugurated, sponsored, promoted, and formed the Association; dominated and interfered with its administration; or gave it financial or other support. The Board, the respondent, and the Association were represented by counsel. The Union appeared by one of its official representatives. All parties participated in the hearing where full opportunity was afforded them to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues. At the commencement of the hearing, counsel for the respondent moved, in which motion counsel for the Association joined, to dismiss the proceeding on the ground the proceeding was barred by the rider attached to the Federal Security Appropriation Act of 1944, Chapter 221, Public Law 135, 78th Congress.¹ The motion was denied. This motion was again renewed, and each time joined in by counsel for the Association, at the conclusion of the Board's case and at the end of the hearing. The motions were again denied. At the conclusion of the taking of all testimony, the motion of Board's counsel to conform the pleadings to the proof was granted over the objections of the respondent's counsel and the Association's coun-

¹The rider is commonly referred to as the "rider to 1944 Appropriation Act."

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sel. The motion was made applicable only as to the correction of dates, names, and other minor recitals. Motions by the respondent's counsel and by the Association's counsel to dismiss the entire proceeding for failure of proof were taken under consideration and are now denied. Oral argument, in which counsel for the Board, for the respondent, and for the Association participated, was heard at the conclusion of the taking of the evidence and is a part of the record. The parties were granted leave to file briefs with the undersigned on or before December 22, 1943. A brief has been received from the respondent's counsel.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes, in addition to the above, the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Kinner Motors, Inc., a California corporation, owns and operates two plants at Glendale, California, where it is engaged in the manufacture of aircraft engine parts and the assembly of aircraft engines. From January 1, 1943, to November 3, 1943, the respondent purchased raw materials amounting to approximately \$6,162,648 in value. Of this total, materials valued at about \$2,930,169 were transported to its plant from points outside California. During the same period the respondent sold products amounting to \$3,054,314 in value, of which

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amount sales approximating \$458,157 in value were made for delivery outside California.

The respondent conceded that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATIONS INVOLVED

International Association of Machinists Lodge No. 311 is a labor organization affiliated with the American Federation of Labor and admits to membership employees of the respondent.²

Kinner Motors Employees Association, Inc., is an unaffiliated labor organization admitting to membership only employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. The respondent's interference with an domination of the formation of the Association.

In the early part of March 1943, the Union started to organize the respondent's employees. Soon after the Union organizing campaign began, R. W. Walker, who had charge of the night shift once each week, obtained permission from Foreman B. C. Johnson to ask the "boys" about forming an inside organization.³ During a lunch period Walker

²The instant proceeding was instituted by Lodge 94 for and on behalf of Lodge 311.

³At the hearing, Foreman Johnson denied that Walker acted in his stead during the one night each week when he was off duty. When confronted with an affidavit previously signed by himself, however, he finally admitted that, although without the

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called together all of the employees on his shift and, in Johnson's presence,⁴ told them, according to his own admission, that "the A. F. of L. was handbilling us at the gate," and "that we were going to have some sort of an organization pretty soon, and I thought it would be a good idea if we had one of our own."

Shortly after Walker's speech,⁵ Leadman John Williams, father of Chief Inspector George Williams, consulted with Leadman Orville Gilbert and Howard Sharrar concerning the organization of an inside union. John Williams conferred with Attorney Marlan Proctor. Acting upon Proctor's advice, John Williams, Gilbert, and Sharrar signed articles on March 22 incorporating the Association.

The three leadmen then had cards printed bearing the following text:

title of foreman. Walker was "top man" during his absence. Walker's testimony is uncontradicted that during the period in question Johnson was absent one day each week, and that on these occasions he was in charge.

⁴Johnson was not questioned about giving Walker permission. He admitted that the speech was made and that he was present, but stated that when Walker started "some sort of gabble" he went down to the end of the shop, began to operate a noisy machine and did not hear what was said. Whether he heard Walker's speech or not is immaterial, since it is undisputed that after being informed of the nature of the speech he authorized its delivery.

⁵Walker testified that he delivered his speech two or three weeks before the Association was "heard of."

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I, the undersigned, hereby designate and appoint Kinner Motors Employees' Association, Inc., as my exclusive bargaining agent under and by virtue of the terms of the National Labor Relations Act.

Williams distributed these cards among other leadmen who, in turn, solicited the signatures of employees throughout the plant during working hours.⁶ Foreman Johnson and W. J. Kroening, a supervisory employee⁷ also distributed these cards

⁶This finding is based upon the credible testimony of Leadmen Orrill and Gardiner.

⁷The confused state of the record does not permit a finding as to Kroening's exact classification. According to information read into evidence by Personnel Manager Sullivan, from purported company records, Kroening was hired in 1941 as a test mechanic, was reclassified to sub-foreman in July 1942, reclassified to test operator in January 1943, and reclassified to leadman in August, 1943. Sullivan also testified, however, that classifications had been listed correctly in a document which he prepared in September 1943, and this document, in evidence, lists Kroening as a foreman. Kroening testified that while he had been hired as a test mechanic, he had always performed the same duties, and that in August 1943, when obtaining information for the Draft Board, he was told by Test Superintendent Gerber that he was a foreman. The evidence is clear that at the time of his activity on behalf of the Association Kroening had supervisory powers, whatever his title or classification. Personnel records show that from March until August 1943, he had charge of a test crew. Kroening stated that he had up to 10 men under his supervision, that he checked their work, instructed new em-

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and urged employees to join the Association.⁸ Foreman Earl H. Friar told employees during smoking periods at the plant that he favored the association, and paid initiation fees into the organization.⁹

The first general meeting of the Association was held April 16, at a public hall. At the request of John Williams and Sharrar, Receiving Clerk R. L. Stevens acted as temporary chairman. At the second meeting held on April 23, Stevens was elected president, and he continued in this office until about

ployees, and that several employees whom he recommended for wage increases received them. The undersigned finds that his position and duties were such that employees reasonably considered his Association activities as having the approval and support of management.

⁸Kroening admitted engaging in this conduct. Johnson denied having either passed out cards or advising employees to join. The undersigned does not accept his denial as true. The finding rests upon the credible testimony of employee J. M. Davis, who testified that Johnson distributed cards among the employees, saying, "Boys, we've got some thing here." Davis named two other employees who were present at the time. Neither was called as a witness by the respondent.

⁹At the hearing Friar denied that he was or is a foreman. He admitted, however, that he assists Chief Inspector Williams, assigns jobs to and "looks after" eight employees, assumes responsibilities for the department when Williams is away, and recommends pay increases for the men in the department. Furthermore, Friar is classified as a foreman on a list of employees prepared by Personnel Director Sullivan in September 1943, and verified by him at the hearing.

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a month before the hearing. Although promoted on May 1, being placed in charge of the receiving department, with supervision over three other clerks and a mover, Stevens remained in office as head of the Association. Christine Jagoe, secretary to Personnel Manager Sullivan, acted as secretary at the first Association meeting. Thereafter Rose Minor became secretary of the organization. Miss Minor is also employed in the personnel office, in charge of employee insurance and personnel records.

B. The respondent's domination of and interference with administration of the Association

On May 1, Proctor wrote to the respondent, asking that the Association be recognized as the exclusive collective bargaining agent of the employees, and accompanying the request with a number of signed cards, the text of which has been noted above. On May 7, President Herring of the respondent wrote to the Association, stating that the cards had been checked, that the respondent would grant the request for recognition, and that it "would be pleased" to discuss "any matters" with it.

On June 16, the respondent and the Association entered into a collective bargaining agreement for 1 year, by terms of which the respondent recognized the Association as the exclusive bargaining agent for all the employees except certain exclusions. The contract covered wages and working conditions. The respondent, at its own expense,

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thereafter had copies of the contract printed. Within its covers were bound detachable cards, one an application for membership in the Association, and the other authorizing the respondent to make certain deductions monthly and to pay the deductions to the Association. Copies of the contract were distributed to all employees, and thereafter were given to each new employee at the time of hiring, by the personnel office.

In July the respondent permitted the following notice to be placed on the plant bulletin boards:

NOTICE TO NIGHT SHIFT EMPLOYEES

Please be advised that commencing immediately a bonus for night shift employees of five cents an hour will be paid by Kinner Motor Company, Inc., in accordance with the terms of the contract recently executed by and between Kinner Motor Company, Inc., and Kinner Motors Employees Association, Inc.

Please be further advised that this bonus has been approved by the War Labor Board.

**KINNER MOTORS EMPLOYEES
ASSOCIATION, INC.**

**By ROBT. L. STEVENS,
President**

The contract contains no such provision as that referred to in the notice.

During the summer an election was conducted among the employees of the night shift, during

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working hours and with the knowledge of Foreman Johnson,¹⁰ to select a steward to attend Association meetings, Leadman Cadaret was elected. He thereafter attended Association meetings, which were held during his working hours, without punching out his time cards. There is no evidence that any deduction was ever made for time thus lost from his work. Cadaret testified that he did not ask to be "excused" for such absences. Under the circumstances it is reasonable to infer, and the undersigned finds, that Cadaret was permitted by the respondent to leave his work, without pay deduction, to attend Association meetings.

In September President Stevens of the Association and employee Colburn consulted Chief Inspector Williams and obtained his permission to have Colburn serve as secretary-treasurer of the Association.

In November Sullivan assembled all employees during working hours, on both the day and the night shift, and delivered extemporaneous speeches. Among other things, he urged employees to submit their grievances through the Association and advised them to consult with either their "superiors" or with the Association "officials" in obtaining "official" answers or opinions relating to grievances. At the night shift meeting he also told employees that while he had no right to solicit

¹⁰This finding is based upon Johnson's admission at the hearing.

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their membership in the Association, it had been organized for them and he thought it best for them to join.¹¹

C. CONCLUSIONS

Upon the entire record, the undersigned is convinced and finds that the Association is the creature of the respondent and was brought into existence and utilized by the respondent to defeat and forestall the organizational efforts of the Union. The contention of the respondent that the Association was the spontaneous result of the organizational desires of its employees is not supported by the record. As noted above, just before the Association was formed, Foreman Johnson permitted his assistant, Walker, to address all employees on the night shift and urge the formation of an inside organization. The Association was thereafter formed. Solicitation of members occurred openly and during working hours. Association cards were distributed by Johnson and Kroening. Foreman Friar joined the organization and told employees

¹¹The findings as to the additional remarks made by Sullivan at the night shift meeting rest upon the credible testimony of employee Davis. As to the other remarks, the findings are based upon a document in evidence which Sullivan described as being the transcription of notes made by his stenographer of his statement to the day shift. No stenographer was present at the night session. He denied having advised employees to join the Association. The undersigned does not accept his denial as true.

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that he favored the Association.¹² Nor did the respondent cease to interfere with and give support to the Association after its organization. As found above, Leadman Cadaret was permitted to leave his work on the night shift to attend Association meetings, without pay deduction, Chief Inspector Williams was consulted as to whether or not one of the employees under him could serve as an Association officer, and Sullivan plainly advised employees on the night shift in November, that it would be best for them to join the Association.

The undersigned finds that by the foregoing acts the respondent has dominated and interfered with the formation and administration of the Association and has contributed financial and other support to it, thereby interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent as described in Sec-

¹²Although the record contains persuasive evidence that leadmen who formally organized and became officers of the Association possessed supervisory powers, the undersigned considers it unnecessary to determine that point here. Whatever their supervisory powers, it is clear that they were acting with the support and approval of management.

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tion I above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the respondent has engaged in certain unfair labor practices, it will be recommended that the respondent cease and desist from such conduct and take certain affirmative action which the undersigned finds necessary to effectuate the policies of the Act.

Having found that the respondent dominated and interfered with the formation and administration of the Association and contributed support to it, the undersigned therefore will recommend, in order to effectuate the policies of the Act and to free the respondent's employees from such domination and interference, and the effects thereof, that the respondent withdraw all recognition from the Association as representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment and completely to disestablish it as such representative.

It has also been found that the agreement of June 16, 1943, entered into by and between the respondent and the Association has been a means whereby the respondent has utilized an employer-

Board's Exhibit No. 8—(Continued)

dominated labor organization to frustrate self-organization and defeat genuine collective bargaining by its employees. Under these circumstances any continuation, renewal, or modification of this agreement would perpetuate the conditions which have deprived the employees of the rights guaranteed to them by the Act and would render ineffectual other portions of these remedial recommendations. It will therefore be recommended that the respondent cease giving effect to any agreement between it and the Association, or to any modification or extension thereof. Nothing in these recommendations, however, should be taken to require the respondent to vary these wage, hour, and other substantive features of its relations with the employees themselves, if any, which the respondent established in performance of the said agreement as extended, renewed, modified, supplemented or superseded.

Upon the basis of the foregoing findings of fact and upon the entire record in the case the undersigned makes the following:

CONCLUSIONS OF LAW

1. International Association of Machinists, Lodge No. 311, affiliated with the American Federation of Labor, and Kinner Motors Employees Association, Inc., are labor organizations within the meaning of Section 2 (5) of the Act.

2. By dominating and interfering with the formation and administration of Kinner Motors Em-

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ployees Association, Inc., and contributing financial and other support to it, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (2) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends that the respondent, Kinner Motors, Inc., its officers, agents, representatives, and assigns shall:

1. Cease and desist from:

(a) Dominating or interfering with the administration of Kinner Motors Employees Association, Inc., or with the formation or administration of any other labor organization of its employees, or from contributing financial or other support to Kinner Motors Employees Association, Inc., or to any other labor organization of its employees;

(b) Recognizing Kinner Motors Employees Association, Inc., as the exclusive representative of its employees for the purposes of collective bargaining;

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(c) Giving effect to its contract of June 16, 1943, with Kinner Motors Employees Association, Inc., or any revision, renewal, extension, modification, or supplement thereof, or to any superceding contract which may now be in effect;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Withdraw all recognition from Kinner Motors Employees Association, Inc., as the representative of any of its employees for the purposes of collective bargaining with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, and completely disestablish Kinner Motors Employees Association, Inc., as such representative;

(b) Post immediately in conspicuous places throughout the respondent's Glendale, plants, and maintain for a period of sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraphs 1 (a), (b),

Board's Exhibit No. 8—(Continued)

(c) and (d) of these recommendations; (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the Twenty-first Region, in writing within ten (10) days from the receipt of this Intermediate Report what steps the respondent has taken to comply therewith;

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report the respondent notify said Regional Director in writing that it has complied with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief,

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the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

HOWARD MYERS

Trial Examiner

Dated: January 25, 1944.

ROSS NICHOLS

called as a witness by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. Do you remember the incident of the lay-off of Mr. Swope? A. I do.

Q. What occurred at that time? What action did you take in connection with the lay-off? What did you do in connection with it?

A. Well, I simply—when I got to the termination of the work where I wasn't able to supply further work for him, why, I had to make out a release and lay him off.

Q. Did you talk to anybody in connection with that?

(Testimony of Ross Nichols.)

A. No, outside of Mr. Davey in the morning.

Q. Did you talk to Mr. Davey about it?

A. Oh, yes.

Q. What did you tell Mr. Davey?

A. Well, I simply pointed out the work was getting so slack that I didn't know what to do with the night men, and particularly Mr. Swope at that time. The job that he was on should have been finished the night before, and it was only half finished; so I had to lay him off that same day.

Q. Did you have enough work for him on the night he was [495] laid off, to go through the entire night?

A. No. The job he had started, why, it was the only job I had ahead of him.

Q. Would it have taken the full night shift to have finished that work?

A. No, I should say—well, as I said, he should have had it done the night before. It only probably would take no more than two or three hours to finish it.

Q. If you had kept him it would have been an economic loss for the balance of the time?

A. That is right.

Mr. Esterman: That is objected to as calling for the conclusion on a matter within the province of the Examiner and the Board to decide.

Trial Examiner Spencer: I think it is rather an improper question on direct examination. I will take the answer, if you want it. It is very leading.

Mr. Collins: Yes.

(Testimony of Ross Nichols.)

Mr. Esterman: May I hear the question?

(The record was read.)

Mr. Esterman: It is objected to on the further grounds the question is meaningless, ambiguous and unintelligible.

Trial Examiner Spencer: He may answer.

What is your answer?

The Witness: Answer to what? [496]

Trial Examiner Spencer: The question.

Mr. Collins: Will you read the question again?

(The record was read.)

The Witness: That is right.

Q. (By Mr. Collins): When did you report this situation in connection with the lack of work as to Mr. Swope to Mr. Davey?

A. It was early in the morning.

Q. February 16th?

A. The day I laid the man off. Is that the 16th?

Q. I believe it was. Did you talk to Mr. Swope that evening?

A. I did.

Q. Where did you see him?

A. At his machine.

Q. Incidentally, is there any policy at Kinner's about notifying anybody relative to their lay-off or discharge prior to the time that they are laid off?

Mr. Esterman: If he knows.

Q. (By Mr. Collins): If you know.

A. I do not know.

Q. Where did you see him?

A. Mr. Swope?

(Testimony of Ross Nichols.)

Q. Yes. A. At his machine. [497]

Q. What did you say to him?

A. I told him that the work was getting so slack I would have to lay him off. [498]

Q. Now, did you ever notice Mr. Swope wearing any A. F. of L. badges, union buttons?

A. I did not.

Trial Examiner Spencer: Did you ever see him wearing any kind of a union button?

The Witness: No. [499]

Trial Examiner Spencer: It may stay on the record.

Q. (By Mr. Collins): What was the cause of the lay-off in connection with Gilpin and Davis?

A. Insufficient work.

Q. Did you talk to anybody about that?

A. Nobody except Mr. Davey.

Q. What did you say to Mr. Davey?

A. Practically the same thing I said to him previous to the time when I laid Mr. Swope off.

Q. What was that? What did you tell him?

A. The work was so slack I didn't know what to do with the men.

Q. What did he say?

A. Well, he said, "Use your own judgment. You will have to do what you consider best."

Q. Since February 23rd has there ever been operated any night shift in the tool room at Plant No. 1? A. No. [501]

Q. Has it been necessary at any time in your opinion, since February 23rd, to operate a night shift in the tool room in Plant No. 1?

(Testimony of Ross Nichols.)

A. No.

Mr. Esterman: I object to that on the ground there is nothing in this record to show this witness is qualified to give that opinion. I don't know how long he has been with the company.

Q. (By Mr. Collins): How long have you been with Kinner Motors, Inc.?

A. I started with Kinner's the 2nd day of January, 1929.

Q. Have you been with them constantly?

A. No.

Q. How long were you with them after 1929?

A. The last time that I started with Kinner's I think it was in '35 or '36.

Q. You have been with them continuously since '35 or '36?

A. Every day; sometimes seven days a week.

Q. How long have you been in charge of the tool room work?

A. Practically ever since.

Q. Since 1935 or 1936? A. Yes.

Q. During that time have you been in charge of the work? A. Designing—yes.

Mr. Esterman: One moment, please. I would like to hear [502] the rest of the question and I would like to hear the rest of the answer. The witness answered before the question came out.

Trial Examiner Spencer: Read what you have of it.

(The record was read.)

(Testimony of Ross Nichols.)

Trial Examiner Spencer: "Designing, yes," is that the answer you wanted to give?

The Witness: I have been in charge of the work since I have been reinstated at that time.

Mr. Esterman: Does that mean in charge of the tool room work? I am sorry. I must know.

The Witness: Tool room work.

Trial Examiner Spencer: I didn't understand the word "reinstated." What did you mean by that?

The Witness: That was after the period that I was off and went back in '35.

Q. (By Mr. Collins): Now, may I ask you this: Mr. Nichols, in your opinion, since February 23rd up to now, is it necessary or has it been necessary to operate the night shift in the tool room in Plant No. 2? A. Plant No. 2?

Q. Plant No. 1.

A. No, not in Plant No. 1. [503]

Q. (By Mr. Collins): Now, did you have any talk with either Gilpin or Davis on the night of the 23rd, when they were laid off?

A. There was some talk. I don't remember——
[504]

Q. (By Mr. Collins) Did you discuss the lay-off?

A. Yes, on account of the lack of work.

Q. You told them that? A. Yes.

Q. Where was that?

A. That was at the tool room door entrance.

(Testimony of Ross Nichols.)

Q. About what time of the day?

A. Between 6:00 and 6:30.

Q. Was anybody else present?

A. Not except the guard that was with the two men, that came from the personnel office.

Q. What did they say when you said it was for lack of work?

A. I remember one quotation one of the other—yes, Mr. Gilpin said that he thought it was—it sounded fishy.

Q. What did you say?

A. I made no remark.

Q. Was anything else said about it?

A. Not that I remember. [505]

Q. Now, prior to the time that Swope and Davis and Gilpin were laid off, what was the condition of the work, both as to the day shift and the night shift in Plant No. 1, as to whether or not it was increasing or diminishing, or how it was occurring in regard to tool room work?

A. It was gradually decreasing right along.

Q. Prior to the lay-off of these three men had you had a larger force on the night shift?

A. Oh, yes, some year and a half or so before that.

Q. How many did you have at one time?

A. Both day and night there was probably between 35 and 40; 50, something like that.

Q. How many on the night shift?

A. There was probably at one time as many as 15.

(Testimony of Ross Nichols.)

Trial Examiner Spencer: When would you say that was?

The Witness: That would be at least—let's see, the latter part of '42.

Trial Examiner Spencer: It is your testimony the latter part of 1942 you had about 15 men employed in the tool room on the night shift?

The Witness: Yes. [506]

Cross Examination

Q. With respect to Mr. Dick Swope's lay-off on February 16th, who made the decision to lay him off? A. I wrote up the release. [512]

Q. Now, who decided, if you know, to lay off Lewis Gilpin and Jim Davis?

A. Who decided?

Q. Yes, if you know. A. I decided myself.

Q. Calling your attention to the fact they were laid off on the night of the 23rd, when did you decide to lay them off? A. That day.

Q. The same day? A. The same day.

Q. What circumstances caused you to make that decision?

A. Because I had no work for them to do.

Q. Did you discuss that with anyone?

A. Yes.

Q. Who? A. Mr. Davey, in the morning.

Q. The same day?

A. That same day, sure. [533]

Q. Was anyone else present when you talked it over with him? A. Oh, no.

(Testimony of Ross Nichols.)

Q. Tell us what your discussion was with Mr. Davey. Tell us what you said and what he said.

A. I told him the time was drawing to such a close on work I didn't know what to do with the men, in order to keep them in work. I was giving them little insubordinate jobs that didn't amount to anything. I just simply run out. I didn't know what to do with them.

He told me, "Well," he says, "the only thing you can do is lay them off, as far as I can see."

Q. Did you mention either Gilpin or Davis by name to him?

A. Not particularly by name, because they were the only ones on nights at the time.

Q. You mean in the tool room?

A. In the tool room.

Q. Did you say anything to Davey about the tool room? Tell me again what you told Mr. Davey.

A. I told Mr. Davey I was running short of work, that I had nothing for these two men to do.

Q. Did you name them?

A. I don't particularly remember that I mentioned their names.

Q. Did he ask who they were? [534]

A. No, he didn't ask me, because it was clearly understood who they were.

Mr. Esterman: I move to strike the witness' answer beginning with the word "because." It is clearly not responsive and gratuitous information furnished by the witness.

(Testimony of Ross Nichols.)

Trial Examiner Spencer: All right. That portion may be stricken.

Q. (By Mr. Esterman) I asked you if Mr. Davey, at the time of that discussion, mentioned the name of Gilpin at any time? A. No.

Q. Did he mention the name of Davis at any time? A. No.

Q. Did he mention either name? A. No.

Q. Thank you. When you decided to lay them off on that day, February 23rd, according to this record,— A. Right. [535]

Q. Did you make out a slip like that for Swope when you laid him off? A. Oh, yes.

Q. What did you put on his slip, Swope's?

A. What did I put on it?

Q. Yes. What did you write on it?

A. I instructed the stenographer to write "lack of work," [548] which was the reason why I was laying Swope off.

Q. What you have just told me is what you wrote on the slip? A. That is right.

Q. Did you make out one or two slips for Gilpin and Davis? A. One slip for each one.

Q. Those were pink slips, too? A. Yes.

Q. What did you write on Gilpin's, the same thing, "lack of work"? Tell me what you wrote.

Mr. Collins: I object to that, incompetent, irrelevant and immaterial.

Trial Examiner Spencer: All right. He testified he told the stenographer to write on Swope's

Testimony of Ross Nichols.)

slip. He hasn't testified he wrote anything on Davis' and Gilpin's.

Mr. Esterman: I beg your pardon.

Trial Examiner Spencer: I don't think.

Q. (By Mr. Esterman) Did you make out a slip for Gilpin when you laid him off?

A. I had the stenographer make one out.

Q. You went in and told her to make slips out?

A. That is right.

Q. What did you tell her?

A. I told her to make out a release for Mr. Gilpin and Mr. Davis. She wanted to know what foundation, and I told her [549] that "lack of work," and she simply typed in the "lack of work."

[550]

Redirect Examination

Q. You have noticed the machine shop, which is next to the [571] tool room, from time to time recently; have you not? A. Yes.

Q. And up to February 23rd? A. Yes.

Q. Tell the Board anything you observed as to whether or not the number of people working in the machine shop increased or diminished in the last six months up to February 23rd?

A. They kept on diminishing right along.

Q. How many did you say were working in the machine shop on February 23rd?

Mr. Esterman: What shift?

Mr. Collins: On the night shift.

The Witness: February?

(Testimony of Ross Nichols.)

Q. (By Mr. Collins) 23rd?

A. At that time I would probably say there was maybe a dozen or more.

Q. How many now on the night shift in the machine shop?

A. About a half a dozen. [572]

EDWARD DAVEY

called as a witness by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. Do you recall an incident on or about February 16, 1943), in which you had a talk with Mr. Nichols with relation to the tool room at Plant 1?

A. Yes, sir.

Q. Who was present?

A. Just Mr. Nichols and myself.

Q. Where was it located?

A. Right in my office.

Q. What time of day was it?

A. Well, I should say about a quarter to 8:00.

Q. What was said?

Trial Examiner Spencer: 8:00 a.m., I take it, in the morning?

The Witness: What is it?

Trial Examiner Spencer: I take it it was in the morning?

The Witness: Yes. Mr. Nichols stated he was

(Testimony of Edward Davey.)

running out of work, which had been evident for some time other places.

Q. (By Mr. Collins) What did you say?

A. Well, I says,—I think I told him, “Mr. Nichols,” I says, “you know that is your job.”

Q. Was anything said in connection with lay-offs? [589]

A. Well, I guess he mentioned it. I said, “Well, I guess that is it.”

Q. Did he mention any persons’ names as to laying off at that time?

A. I don’t recall. I can’t say. He might have mentioned it and he might have just said, “The tool room at nights.” I don’t know. I wouldn’t say. I couldn’t say.

ROSS NICHOLS

called as a witness by and on behalf of the company, having been previously duly sworn, resumed the stand and testified further as follows: [590]

Recross Examination

Q. (By Mr. Esterman) You have testified, Mr. Nichols, that in connection with Swope’s lay-off you went to him and told him he was laid off because of lack of work, or words to that effect?

A. Yes.

Q. I am talking about Dick Swope.

A. Yes.

(Testimony of Ross Nichols.)

Q. You testified in connection with Gilpin and Davis, their lay-offs, you told the girl to make up the slips and that you first saw them about 10 minutes to 6:00? A. Yes.

Q. That would be about 20 minutes after the shift started? A. That is right.

Q. Now, did you have any reason for laying off Swope by telling him personally and laying off Davis and Gilpin the way you did lay them off?

A. The way I did?

Q. As I understand your testimony,—I want to make it clear—in Swope's case you went to him, after the shift had started, and after he was at his lathe——

A. Yes; that was when he came in that night. He came in directly through instead of going to the personnel first. The other two men, they went to the personnel first, before they came in that night. I didn't have a chance to see them [591] until after they came from the personnel.

Q. You knew that their time cards were taken out of the rack; didn't you?

A. No, I didn't know the time cards were taken out.

Trial Examiner Spencer: Mr. Nichols, you had already issued instructions that Gilpin and Davis were to be laid off before Gilpin and Davis came into the plant; is that right?

The Witness: That is right.

Trial Examiner Spencer: Was that true of Swope?

(Testimony of Ross Nichols.)

The Witness: That is right.

Trial Examiner Spencer: You had also issued instructions on Swope?

The Witness: That is right.

Trial Examiner Spencer: I see.

Q. (By Mr. Esterman) Did you say anything to Davis and Gilpin to the effect you didn't know anything about it?

A. That I didn't know anything about it?

Q. Yes. Or words to that effect? A. No.

Mr. Esterman: That is all. [592]

EDWARD DAVEY

called as a witness by and on behalf of the company, having been previously duly sworn, was examined and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Collins) Mr. Davey, subsequent to that, did you ever have another conversation on or about February 23rd with Mr. Nichols with relation to the night shift in the tool [593] room?

A. That is right.

Q. When was that?

A. On the day he stated.

Q. About what time of day?

A. The same. I get in my office about a quarter of 8:00.

Q. Who else was present, if anyone?

A. No one.

(Testimony of Edward Davey)

Q. What did he say at that time? What was the conversation? What did you say?

A. The best I can recollect is that he said that he had reached the end of his work.

He said: "I can't find any more work."

I says, "Well, we are suffering the same in the machine shop."

Q. What else was said?

A. That is about all.

Q. Did he say anything in regard to closing the tool room?

A. Oh, he said, "What about it?"

I said, "That is up to you. That is your job to keep that tool room in shape and get the necessary tools out and all that."

Q. Can you remember any more of the conversation?

A. No, I can't say I do.

Q. Now, prior to February 16, 1944, had you ever seen any [594] union buttons, such as any of these three (indicating) which I show you, being worn by either Gilpin, Davis or Swope?

A. Never; never.

Mr. Collins: May I introduce these merely for identification?

Trial Examiner Spencer: Yes.

(Thereupon, the documents referred to were marked Company's Exhibits 1-A and 1-B, for identification.)

Mr. Collins: We have all referred to them.

Q. (By Mr. Collins) Did you ever know that

(Testimony of Edward Davey)

Mr. Davis was soliciting from the employees of Kinner Motors, Inc., that they sign authorization cards or membership cards in the Machinists Union? A. No, sir.

Q. Did you ever know that Mr. Swope was working in preparation for the hearing before the National Labor Relations Board in December?

A. Might I ask you to clarify that? I don't know even what you mean by "did I know." I only knew that he was up here.

Q. Outside of that you knew he was here?

A. I don't know.

Q. Did you know what he was doing when you saw him here?

A. I wasn't here when the testimony was taken; I don't know. [595]

Q. Outside of seeing him here did you know whether or not he was finding data in the plant or in any other way assisting in the preparation?

A. To the best of my knowledge, no. [596]

GLENN HENRY GILMORE

called as a witness by and on behalf of the company, being first duly sworn, was examined and testified as follows:

Cross Examination

Q. (By Mr. Collins) Did you ever have any conversation with Mr. Davis, Mr. Gilpin, Mr. Swope about war bonds? [620]

(Testimony of Glenn Henry Gilmore.)

A. I did with Mr. Gilpin and Mr. Davis, but not with Mr. Swope.

Q. When?

A. It was last fall. I don't know what month.

Q. Where?

A. In the tool room after 4:30.

Q. Who was present?

A. Well, Mr. Malamphey and the rest of the boys in the tool room; some of the fellows ain't there now.

Trial Examiner Spencer: 2:30 p.m., afternoon?

The Witness: After 4:30 p.m.

Trial Examiner Spencer: After 4:30?

The Witness: That is right. Mr. Davis and Mr. Gilpin came on at 4:30, came on at work.

Q. (By Mr. Collins) What was said, Mr. Gilmore? Now, you tell what they said and what you said, the best you can remember.

A. I heard—the question came up. I didn't hear the first of it. It came up about war bonds. I heard Mr. Gilpin say they was no God damn good, and, naturally, I got up on my high-horse and told them what I thought about it.

Q. What did you say?

Mr. Esterman: Just a moment. I move to strike out the answer beginning with the words "and naturally."

Trial Examiner Spencer: They may be stricken.

[621]

What did you say?

Q. (By Mr. Collins): What did you say?

(Testimony of Glenn Henry Gilmore.)

A. I said, I told him—Jim Davis said to me, he says, “As far as I am concerned they are no damn good. How do I know you are going to cash them in when they mature? The country might not be any good.”

I said, “I think the country is plenty good. I like it here. If you don’t like it here, why in the hell don’t you get out.”

As I recall, I told Jim Davis, “Why don’t you go back to Texas?”

Q. What did he say to that

A. He said he liked it here. I can’t recall all that was said. There was a lot said; day after day it went on.

Q. Did you have other conversations to the same effect with him?

Trial Examiner Spencer: With “him” meaning whom?

Mr. Collins: Davis.

The Witness: No; Mr. Gilpin offered to sell me a bond for \$10.00. Right at that time I didn’t have \$10.00.

Q. (By Mr. Collins): When did he offer to sell you a bond for \$10.00.

A. That I don’t know. Right after that came up. I think it was right after the second bond drive.

Q. What did he say when he offered it to you?

[622]

A. Well, he said he would rather have that than nothing at all.

Q. What did you say?

(Testimony of Glenn Henry Gilmore.)

A. That would be pretty tough to say right here.

Q. Did you use cuss words?

A. I sure did. And I got accused afterwards for being tough about it. [623]

Q. Did he say anything on that occasion in connection with war bonds?

A. Yes. He said they were no good. He said if everybody felt that same way, like that, it probably would be a better country to live in. [624]

Q. (By Mr. Collins): Did you hear any conversations, other than you have testified to, in which Mr. Davis said anything about war bonds?

A. Yes. I heard him several times say they didn't think the war bonds were worth a damn.

Q. Who did they say it to?

A. Mr. Malamphey. [625]

Trial Examiner Spencer: You heard both of them or which one?

The Witness: Off and on alternately.

Trial Examiner Spencer: Did you hear both Davis and Gilpin say that?

The Witness: Mr. Gilpin and Mr. Davis. [626]

VERA H. ALLEN

called as a witness by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): During that time, at any time did you talk to—do you know Mr. Davis?

(Testimony of Vera H. Allen.)

A. Yes, sir, I do.

Q. During that time did you have any talk with him about buying war bonds? A. Yes, sir.

Q. When was that? [632]

A. Well, at the time of the drive I asked all of the fellows in that plant—there were only about a dozen in that plant. I asked Jimmy Davis, too, if he would buy a bond. He turned me down.

Q. What did he say?

A. He said he had taken all he could at the time. His child had a penny coin bank. He told me he had added to the contents of that bank and had bought a bond at the time for the child. And he was not in a position to buy any more then, he was moving to Roscoe.

Q. Did he say anything further in connection with the bonds?

A. Not at that time, but later on, during the drive, a few nights later, he stopped by my machine there while I was completing a bond for somebody else; I forget who it was. There was no one else present at the time. He made the statement that the bonds would not be worth a nickle after the war.

Trial Examiner Spencer: Was anybody present besides yourself and Davis at that time?

The Witness: No. To the best of my recollection I don't believe so.

Q. (By Mr. Collins): Did you overhear him say anything else in connection with war bonds at any time?

(Testimony of Vera H. Allen.)

A. Yes; to other people.

Q. When? [633]

CLIFTON EDMOND MALAMPHEY, JR.

called as a witness by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. What was said?

A. Well, they claimed that the war bonds were——

Q. Give the whole conversation. He said this and I said this, to the best of your ability. Say what he said and what everybody said, the substance of it. I know it is hard to do.

A. I will lead up to that. We get our bonds in any envelope——

Mr. Esterman: Just a moment. The question is what was said. I ask the remarks of the witness be stricken on the ground it is not responsive.

Mr. Collins: Just let him finish and see if it is going [652] to be responsive.

Mr. Esterman: It is obviously not responsive. I am not going to have these matters spread on the record. I don't want any history. I want the conversation from this witness.

Trial Examiner Spencer: I am making the rulings here.

You proceed with your testimony.

(Testimony of Clifton Edmond Malamphay, Jr.)

The Witness: As I was saying, we get our bonds in an envelope, the period when they are due, and usually everyone has one in his hand, you know, because they are always examining them and seeing if they get their proper amount. We all had our bonds, and these two fellows, Mr. Davis and Mr. Gilpin, had theirs, too. They said they were no good. They would be no good after the war. And they said they were also selling them as soon as possible.

Trial Examiner Spencer: Did each one of them say this, or both of them?

The Witness: Mr. Davis said that. He was selling them as soon as possible.

Trial Examiner Spencer: You will have to bring it down. We will have to have what each one said.

The Witness: All right. Mr. Davis said he was selling them as soon as possible. Mr. Gilpin said he would sell them to anyone for \$10.00. He will admit it. I took it home. [653]

JOHN A. SZABO

called as a witness by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. Where was it?

A. That was one night in front of the clock when there was a bulletin up there stating that there was going to be another blood donation.

(Testimony of John A. Szabo.)

Q. Wait a minute. Who was present?

A. Well, I can recall Davis was, Mr. Gilpin and Johnson and Koler and Les Dayhoff and myself, that I remember of.

Q. What was said? [678]

A. Gilpin said that the Red Cross was making money on the blood; they were selling it.

Mr. Esterman: Will counsel fix the time, please?

Q. (By Mr. Collins): When was it? What day of what month or in what month?

A. It was in January some time. I don't know the date.

Q. What was said? What time of day was it?

A. Just before quitting time. We used to quit at 3:30 at that time.

Q. What was said? [679]

A. Well, we were all talking about blood donations and Johnson comes along and said, "Are you fellows going to sign up for the blood bank, for blood donations?"

Gilpin said, "Well, the Red Cross is making money on that." He said, "They are selling that blood."

Q. What did anybody else say when he made that remark?

A. No one said anything; didn't say a word.

Q. Was there a deep silence? A. Yes.

Q. Was anything else said? A. No.

Q. Now, have you ever been present when either Mr. Davis or Mr. Gilpin said anything about War Bonds or Mr. Swope? A. Yes.

(Testimony of John A. Szabo.)

Q. Yes or no? A. Yes.

Q. When was that?

A. Well, I don't remember the date.

Q. Do you remember the month?

A. Well, it was in January.

Q. Who was present?

A. At one time there I remember Gilpin and Davis, and I think Mr. Gerth was up there, and that was up in the Men's Room.

Mr. Gilpin says, "I see they are selling them War Bonds [680] again."

I said, "Yes." I said, "I got about \$1500.00 worth."

He said, "Well, they won't be worth a nickel after the war. They won't be no account." That is just how he said it. Of course, I didn't say anything——

Trial Examiner Spencer: Was there anything further said?

The Witness: No. I went right downstairs from there.

Q. (By Mr. Collins): Did anybody say anything further?

A. Not that I, because I went as soon as—when he said, "They won't be worth a nickel" I went downstairs.

Trial Examiner Spencer: Your answer was no; is that right? There wasn't anything further said? The question was was there anything further said. What is your answer?

(Testimony of John A. Szabo.)

The Witness: No, there was nothing further said.

Q. (By Mr. Collins): Were you present at any other conversations or did you participate in any other conversations with Davis, Swope or Gilpin at which War Bonds were mentioned?

A. I know Johnson come by one night—that is the night foreman—Swope was walking by and he said, “Swope, have you signed up for a War Bond?” Swope was walking by.

He said, “I wouldn’t give you a nickel for any War Bond.” This was all said while he was walking by. He kept going, and that is all that was said. [681]

He said, “Helen Allen over there is selling them.”

Q. Was there any other time that was said by Swope? A. Yes.

Q. Any other time?

A. Well, I think that at one time Jack Brown, while he was still there, one time they were setting there eating lunch, and the War Bond drive come in, talking about War Bonds. Swope said he wouldn’t give a nickel for any War Bond. [682]

Cross-Examination

Q. (By Mr. Esterman): Did you ever discuss War Bonds with any one else, other than Frank and these other gentlemen?

A. No, I asked Vera Allen if anybody bought Bonds, and she said, “Everyone but the three boys in the tool room.” [688]

(Testimony of John A. Szabo.)

Q. You asked whom? A. Vera Allen.

Q. That is the lady that was on the stand awhile ago? A. Yes.

Q. Did you discuss Bonds with anyone else at the plant, other than the people you have mentioned?

A. Well, I talked to Mr. Garrett one night. We were standing there grinding a tool, and he was waiting until I got done. I says, "What do you think of those fellows making that remark up there in the Men's Room?" I says, "Now supposing that they were out at the Victory House here and the man got up there and asked, 'Who wants to buy a Bond?' And someone got up and says, 'The Bond isn't worth a nickel. I wouldn't give you a cent. They are no good'."

I said, "What do you think would happen to such a person?" That is all the conversation I had.

Q. What did he say?

A. Well, he said, they would probably mob him.

[689]

FRANK PETER HOLMES

called as a witness by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Direct Examination

The question is did you have a conversation with either Davis or Gilpin about war bonds?

The Witness: Yes.

(Testimony of Frank Peter Holmes.)

Q. (By Mr. Collins): When was that?

A. It was some time in July, I think. I don't know just when it was; when I got my first \$50.00 bond.

Q. July when? A. July, 1943.

Q. You say you got your first what, \$50.00 bond?

A. \$50.00 bond. I started there in June, June the 1st, [718] so I didn't get that bond until about July.

Q. You started your employment there?

A. I started to work there June 1, 1943.

Q. How many bonds were you subscribing for?

A. \$50.00 bond a month.

Q. Where did you have this conversation with Mr. Davis and Mr. Gilpin? Where was the conversation?

A. Down at the shop there.

Q. What shop? A. At Kinner Motors.

Q. The tool shop or the machine shop?

A. The tool shop.

Q. In the tool shop? A. Yes.

Q. Who else was present at the conversation? I mean in the conversation.

A. I don't think there was anybody else in there. I couldn't say.

Q. What was said? What did you say and what did they say?

A. I told them I got a \$50.00 bond a month. Then they said that they wouldn't be worth \$5.00 apiece after the war.

(Testimony of Frank Peter Holmes.)

Mr. Esterman: May we find out who said this?

Q. (By Mr. Collins) Who said that, do you remember? A. Both of them.

Q. Did they say anything else? [719]

A. No.

Q. What did you say?

A. I didn't know what to say to them. [720]

JOHN HARDING SHELLEY,

called as a witness by and on behalf of the company, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. Do you know either Mr. Davis, Mr. Lewis Gilpin or Mr. Richard Swope?

A. I do. I know all three of them.

Q. Have you ever had a conversation with any one of them or all three of them or any two of them in which war bonds have been mentioned?

A. I have on a number of occasions.

Q. With whom?

A. Well, with practically all of the tool room part of the shop on various occasions, just with them by themselves.

Q. Will you name one of those occasions?

A. Well, right after the first bond drive was one occasion. Another occasion was——

Q. Let's take that one, after the first bond drive. [735] Who was present at that time?

(Testimony of John Harding Shelley.)

A. Glenn Gilmore, Davis, Gilpin and within a short time was Melamphey and Alf Gratrix.

Q. What was said?

A. Well, vaguely the discussion was, "I hope the bonds is all right after the war."

Q. Do you remember the next conversation?

A. Oh, I believe it was when I bought a bond. I said I [736] had gotten a \$50.00 bond, and they said, "You can paper the house with it."

Q. Who said it? A. Gilpin.

Q. What did he say?

A. "I guess we can paper the house with them when the war is over."

Q. What did you say?

A. I said a lot of people thought that way, but there were a lot of people that bought them, anyway, and I would take a chance.

Q. Was anything else said?

A. No, I believe that covers it. [737]

BRIAN CHARLES MICHAEL JOHNSON

called as a witness by and on behalf of the company, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. Now, do you recall having a conversation with Mr. Sullivan relative to remarks that had been made by Davis, Gilpin or Swope in connection with the blood bank or war bonds?

(Testimony of Brian Charles Michael Johnson.)

A. Yes.

Mr. Esterman: Just a moment. I object to that as being incompetent, irrelevant and immaterial what conversation he had with Mr. Sullivan; a foreman talking to a personnel manager.

Mr. Collins: I am not going into the question of what was said. I think that is quite right. It is only for the purpose of fixing the time that this information was given to the personnel office.

Trial Examiner Spencer: Yes. I will take it on that [746] basis.

Mr. Collins: I don't care to go into what he said. That isn't the point.

Q. (By Mr. Collins): Did you ever?

A. Yes.

Q. When was that?

A. That was about the middle—the latter part of February, a couple of nights, two or three nights after the boys were let go, these three boys, Swope, Gilpin and Davis.

Q. Where did it occur?

A. In the canteen.

Q. You mean, when you say two or three nights after the boys were let go, you refer to which boys?

A. Gilpin, Davis and Swope.

Q. All three of them? A. Yes.

Q. At the time you had this conversation were any of them working there at Kinner's?

A. No, no, they had been let out two or three nights before.

Q. Had you, at any time prior to that time, said

(Testimony of Brian Charles Michael Johnson.)

anything to Mr. Sullivan relative to any remarks that may have been made by any one of these three boys in question, about war bonds? A. No.

Q. In connection with the statements of Davis, Gilpin and [747] Swope relative to the war bonds, did you prepare any statements to be signed by any persons?

A. I didn't prepare any, no. But a statement was dictated to me by one of the men.

Q. Who was that? A. John Szabo.

Q. Did you, as regard to any of the others, make out or prepare any statements or affidavits or anything of the kind? A. No.

Q. What was the method of your writing out the ones you wrote out for Szabo?

A. Well, Szabo was fighting mad. He wasn't in a position to write it.

Mr. Esterman: May I move you, Mr. Examiner, that the gratuitous statement of the witness be stricken from the record?

Trial Examiner Spencer: Yes. "Szabo was fighting mad" may be stricken.

Q. (By Mr. Collins): I don't mean that, Mr. Johnson. I mean did you write it? I am trying to get the method. Did you write it out or did he dictate it, or how was it done?

A. He dictated; as he told me what to put down on the paper, I put it down. His hands were grease and oil.

Trial Examiner Spencer: When was this statement dictated [748] to you?

(Testimony of Brian Charles Michael Johnson.)

The Witness: It was dictated to me about two or three nights after the fellow had left.

Trial Examiner Spencer: Was it the same night you talked to Mr. Sullivan or not?

The Witness: It was the same night I talked to Sullivan.

(The documents referred to were marked as Respondent's Exhibits 3-A, 3-B, 3-C and No. 2 for identification and received in evidence.) [749]

RESPONDENT'S EXHIBIT NO. 3-A

C. 3-A Johnson

2-28-43.

The fellows involved never talked to me much regarding war bonds as I told them at the start my attitude on the matter. However I did hear them make the remark several times that the bonds were no good.

WALLACE GERTH

RESPONDENT'S EXHIBIT NO. 3-B

2/28/44

On several occasions I have heard the tool room boys talking about the bonds and they insisted the bonds would be worthless after the war. And as I have three nephews in the war fighting at this time and want to do all I can to help them and

(Testimony of Brian Charles Michael Johnson.)
would like other people to do the same. The statements of these guys make me mighty mad.

JOHN A. SZABO

Gilpin says your 2000 won't be worth a cent after the war.

RESPONDENT'S EXHIBIT NO. 3-C

As official salesman for the 4th War Loan Drive (on night crew for Plant 1), every employee gladly signed up with the exception of the three men in question. They simply flatly refused to take part in this work that is so very vital to the winning of peace.

VERA H. ALLEN

RESPONDENT'S EXHIBIT NO. 2

AGREEMENT

between

KINNER MOTORS, INC.

and

KINNER MOTORS EMPLOYEES
ASSOCIATION, INC.

Effective Date

June 16, 1943

AGREEMENT

This Agreement made and entered into this 16th day of June, 1943, by and between Kinner Motors,

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

Inc., hereinafter referred to as Company, and Kinner Motors Employees Association, Inc., a California non-profit corporation, hereinafter referred to as the Association:

Whereas, the Company and its employees, through their respective representatives are desirous of entering into a contract for the purpose of stabilizing employment and promoting harmonious relations between the Company and its employees;

It Is Hereby Mutually Agreed by and between the Company and the Association as follows:

ARTICLE 1

RECOGNITION

Section 1—Kinner Motors Employees Association, Inc., Exclusive Bargaining Agent

That Kinner Motors Employees Association, Inc., shall for the duration of the Agreement be recognized by the Company as the sole bargaining agency for the purpose of representing all of the Company's employees, with the exception of the following, to wit: Officers of the Company elected by its Board of Directors, monthly salaried executives, administrative and professional employees, and their secretaries, all outside salesmen and representatives, all foremen, full time guards and firemen, in all negotiations pertaining to hours, wages and other matters concerning their employment by the Company.

Administrative employees are hereby defined as

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

those employees who may exercise their discretion and independent judgment in performing their duties including, but not limited to, the right to hire and fire. This definition of administrative employees, however, shall not be construed as excluding any employee who holds the position of sub-foreman, lead man, or lessor position.

Section 2.—Duration of Agreement

This agreement shall become effective upon the date of its execution and shall remain in full force and effect for one year from the date hereof, and thereafter until either party hereto shall give to the other a sixty (60) day written notice of its desire to terminate this contract or to negotiate a new contract.

ARTICLE II

REPRESENTATION

Section 1—Bargaining Committee

The employees shall be presented by a bargaining committee of not more than nine members, to be elected by the Association in a manner which shall obtain as fair representation as is reasonably possible of all employees covered by this agreement. The representatives for the Company shall consist of not to exceed a like number to be chosen in such a manner as the Company may desire, and shall include at least one officer of the Company.

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

Section 2—Jurisdiction of Bargaining Committee

The Bargaining Committee shall negotiate all contracts and agreements and all modifications and amendments thereof between the Association as a representative of the eligible employees and the Company in all matters pertaining to hours, wages, and working conditions; and shall serve as appeal agent of any unsettled matters which are duly presented to the Grievance Committee as in this agreement provided and which are not satisfactorily settled within a reasonable time.

Section 3—Meetings of Bargaining Committee

There shall be no regular meetings of the Bargaining Committee and it shall only meet if and when circumstances require the same. In the event that either the Association or the Company feels that a meeting of the Bargaining Committee is necessary, a meeting may be called by either party by giving at least ten days notice thereof to the other.

Section 4—Grievance Committee

The Grievance Committee shall be composed of not more than three members of the Association and not more than three representatives of the Company.

Section 5—Jurisdiction of the Grievance Committee

The Grievance Committee shall handle all matters of dispute arising out of the terms of the present agreement or future agreements which may be sub-

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

sequently entered into by and between the Association and the Company, including but not limited to the settlement of any and all grievances which may be filed with the Grievance Committee as provided for in this agreement.

Section 6—Meetings of the Grievance Committee

Regular meetings of the Grievance Committee may be held at 9:00 a.m. on every alternate Tuesday commencing with the second Tuesday after the effective date of this agreement or at such other times as may be mutually agreed upon by and between the parties hereto.

Section 7—Meetings to be Attended without
Loss of Pay

Attendance at all meetings as provided for herein shall be without loss of pay to any of the employees, but attendance at such meetings before or after any such employees regular shift shall not entitle such employee to pay for such additional time. If any of said meetings fall on a holiday the meetings shall be held within the following seven days, the date being mutually agreed upon.

Section 8—Counsel and Secretary

Both the Association and the Company may be represented at all meetings by legal or other counsel and shall each be entitled to a secretary to take the minutes of the meetings.

(Testimony of Brian Charles Michael Johnson.)
Respondent's Exhibit No. 2—(Continued)

ARTICLE III

GRIEVANCE PROCEDURE

Section 1—Waiting Period

It is mutually agreed and understood that should any dispute arise between the Company and any of its employees which cannot be settled by the grievance procedure provided for in this agreement that both parties hereto agree to submit said dispute to arbitration for the purpose of arbitrating and settling said dispute. The arbitration hereinabove provided for shall be handled by an Arbitration Committee composed of three members to be selected as follows, to wit: One of the arbiters shall be selected by the Company, one shall be selected by the Association, and a third and impartial arbiter shall be selected by the two arbiters selected as hereinabove provided. It is further agreed that there will be no strikes or lockouts or any interruption of operations by the Company or the Association or any of its members until an earnest effort for a period of not less than thirty (30) days have been made to settle such dispute through the procedure as provided for in this agreement. Both the Association and the Company hereby recognize the importance of preventing the stoppage of work in order to further the war effort and that each party hereto agrees in the event of a dispute to exercise every reasonable effort in order to prevent a stoppage or slowing up of production.

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

ARTICLE IV

SENIORITY

Seniority is not to be considered as a material factor in regard to any employee's position, but rather each employee's position shall depend upon his productivity, efficiency, ability, skill, effort and length of service.

ARTICLE V

EMPLOYMENT PROCEDURE

Section 1—Notification that Kinner Motors Employees Association, Inc., Exclusive Bargaining Agent

All new employees shall be notified by the Company immediately upon being hired that Kinner Motors Employees Association, Inc., is the exclusive bargaining agent of the eligible employees of the Company by delivering to each new employee a copy of this contract and shall demand a signed receipt for the same at the time the same is delivered.

Section 2—Reports to be Furnished upon Request

As soon as reasonably possible after the execution of this agreement the Company shall furnish to the Association a complete list of the eligible employees and their respective departments showing their classifications, seniorities, dates of hiring, and

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)
shifts and that as soon as reasonably possible after the hiring of a new employee the Company agrees to furnish similar information as hereinabove provided. Kinner Motors Employees Association, Inc., and the Company may request the following reports which are to be furnished as soon as possible;

(a) Upon a request of the Company, the Association shall certify to the Company the number of its members.

(b) Information concerning New Employees. Upon the request of the Association the Company shall certify to Kinner Motors Employees Association, Inc., the number of new employees that are in the various occupational classifications recognized by this agreement.

(c) List of Employees. Upon the request of the Association, the Company shall furnish Kinner Motors Employees Association, Inc., with lists of employees and their respective departments showing classifications, seniorities, date of hiring, and shifts.

(d) Wage Rates in Event of a Grievance. In the event of a grievance being registered concerning the rate of wage of an employee, the Company agrees to furnish to the Grievance Committee of the Association the rates of wages of the various employees in the particular department in which the employee may be working for the purpose of determining whether or not the grievance is well-founded. It is agreed that the Association and all

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

persons connected therewith will keep all information furnished them under this Article strictly confidential.

ARTICLE VI

HOLIDAYS WITH PAY

Subject to Executive Proclamation and federal regulations, all employees regardless of whether working on a straight salary or whether on an hourly or daily rate, shall receive the following legal holidays with pay at the regular normal rate of pay, to wit: January 1 (New Year's Day), May 30 (Memorial Day), July 4 (Independence Day), Labor Day, Thanksgiving Day, and December 25 (Christmas Day).

If and when present executive proclamations and other rules and regulations of the Federal Government are changed so as to permit the same, an employee who works on any of the hereinbefore designated holidays shall be entitled to compensation in addition to his regular base wage, as follows, to wit: Full pay (8 hours at straight time) whenever the holiday falls on Monday through Friday; time and one-half whenever the holiday falls on Saturday and if the employee has already worked at least forty (40) hours in the work week in which the particular Saturday may fall. In the event forty (40) hours of work in a particular week is completed during the Saturday holiday, the rate of pay shall be prorated according to the schedule set forth

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

herein; and double time whenever the holiday falls on a Sunday. For all holiday work in excess of eight (8) hours two times the regular rate of pay shall be paid. No pay under this provision shall be granted employees during vacation or leave with or without pay except as provided in Article XI, Section 2 hereof. Should a recognized holiday fall on a Sunday, the Monday immediately following shall be observed as the holiday.

ARTICLE VII

HOURS OF WORK AND OVERTIME

Section 1—Straight Time

Straight time shall be paid for the first eight (8) hours in any one day and for the first forty (40) hours in any one week.

Section 2—Time and One-half

Time worked in addition to the employees' established work week (forty [40] hours) or in excess of eight (8) hours in one day shall be paid for at the rate of one and one-half ($1\frac{1}{2}$) times the regular rate.

Section 3—Double Time

Subject to Executive Proclamation and Federal regulations, time worked on the second overtime day (seventh consecutive day) of an employee's established work week or after eight (8) hours of an employee's holiday shall be paid for at two (2) times the regular rate. For an example, if an em-

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

ployee's established work week is Monday through Friday, then his second overtime day is Sunday for which he shall be paid two (2) times the regular rate.

ARTICLE VIII

WORKING CONDITIONS

Section 1—Report Time

An employee called to work shall receive the minimum of four (4) hours pay in the shift to which he was called.

Section 2—Bulletin Boards

At least one bulletin board shall be provided by the Company in a conspicuous place in each building occupied by the Company for the exclusive use of the Association. Such board shall be provided with a glass front and a lock, the access to which shall be limited exclusively to the Association for posting all notices in connection with the Association. The Association agrees not to permit the posting of any notices containing any statements in violation of any governmental law, rule, regulation or decree nor permit the same to be used for posting any obscene or indecent literature or pictures.

Section 3—Hiring Age

There shall be no established maximum age limit in hiring or discharging employees.

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

Section 4—Pay Period

Pay checks for each employee shall be issued as at the present time, to wit, on the 5th and 20th day of each calendar month.

Section 5—Rest Period

The present practice concerning rest periods shall prevail, but no employee shall be required to work more than three (3) hours without a rest period of at least ten (10) minutes. During rest periods smoking shall be permitted in certain designated parts of the plants and grounds.

ARTICLE IX

SICK LEAVES

In case of illness of the employee or death in the immediate family, leaves with pay will be allowed up to a total of five (5) days per year, no more than three (3) of which will be allowable at any one time. The year period shall be computed from the date of his or her employment. Employees must notify the Personnel Department of the Company, if possible, within twenty-four (24) hours of physical disability or illness which may be verified by the Company Personnel Department.

ARTICLE X

WAGES

Section 1—Minimum For Apprentice Employees

No employee shall be hired even though he or she is an apprentice at less than 65 cents per hour.

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

Section 2—Additional Pay for Leadmen

A leadman shall be paid at least five cents (5c) per hour more than the highest paid man under his jurisdiction.

Section 3—Advancements

All new employees after the beginning of his or her employment shall be considered probationary employees for a period of 45 days. At the end of said 45 days, said new employees shall either be dismissed for lack of proper qualifications or the minimum starting wage of 65 cents per hour above referred to shall be increased by at least five cents an hour.

Section 4—Limited Transfers

After an employee has worked for 45 days and is no longer a probationary employee, the Company may not transfer said employee to a higher paying position except in the event of an emergency (in which event the Company may require an employee to work in any position for a period not to exceed four weeks in any one six months' period) without paying said employee the rate applicable to said higher paying position.

Section 5—Not to be Construed as a Maximum

Nothing contained herein shall be construed as fixing a maximum wage for any particular job or occupation, except insofar as any federal proclamation or federal or state law or regulation inhibits

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)
or shall inhibit from time to time classifications without maximum wage schedules.

Section 6—Reviews

The rate of pay and the employment record of each employee shall be reviewed by the Company within four (4) months from date of the execution hereof for the purpose of effecting wage adjustment in accordance with the employee's proven ability. Thereafter there shall be called a meeting of the bargaining committee and there shall be presented to it a true statement of the time and effort of the company required in such review procedure, and the parties hereto shall then mutually agree as to the time of reviews thereafter, it being expressly agreed, however, that such reviews shall thereafter be had not less than every six (6) months. Not less than seven (7) days after the end of said review period, each employee shall be notified as to the result of the review and if he does not receive an increase in his wage rate, he shall be notified of the reason or reasons why the increase was not given. The Association Grievance Committee is to inspect all non-increased wage reviews before the employee is notified by the Personnel Department.

After an employee has been classified for a period of four (4) months at the maximum rate of his grade, he may himself or through the appropriate bargaining agency, request and receive from the employer, a review of his qualifications to determine

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

whether or not he should be upgraded to an available job. If such review results in a favorable rating and if an appropriate job is available, he shall be upgraded to that job. If he is not upgraded he shall be entitled to another review at the end of each succeeding interval of four (4) months.

Section 7—Two Ten Hour Shifts

At the present time the policy of the Company has been to work two ten hour shifts and so long as said practice is continued the rate of pay for each shift shall be the same, except that the second shift shall receive a thirty minute lunch period in the middle of the shift for which they shall be paid at the regular rate. Nothing herein contained shall prevent the Company from working the said two shifts at lesser or longer hours on the same basis.

If and when three shifts are adopted the following shall prevail, to wit:

- (a) Night shift employees shall receive a bonus of five (5) cents an hour.
- (b) Third shift employees shall receive eight (8) hours pay plus a five (5) cent an hour bonus for working six and one-half ($6\frac{1}{2}$) hours.

Section 8—Dues to be Deducted from Pay Checks

The Company agrees to deduct Association dues from the pay checks of all those employees who authorize the Company to make the deductions. The

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

Company reserves the right to cancel this provision at any time after ten days notice to the Association.

ARTICLE XI

VACATIONS

Section 1—Vacations with Pay to the Employees
Shall be Granted in Accordance with the
Following Schedule:

1. Employees who have completed one year's continuous service prior to the execution hereof or hereafter have completed one year's continuous service prior to December 1st in any year shall receive a vacation with pay for five working days at the base rate and at the employee's option he shall be entitled to an additional vacation of five working days without pay.

2. Employees who have completed prior to the execution hereof two years or more, continuous service or hereafter have completed two years' continuous service prior to December 1st in any year shall be entitled to a vacation with pay for 10 working days at the base rate.

Section 2—Compulsory Vacations

Employees must take their vacation within ten (10) months of the date of eligibility; otherwise the vacation will be forfeited. Employees shall state their preference with respect to vacation times on forms to be furnished by the Company and the Company shall allow such vacations at such time

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

as the employee involved can best be spared from his production duties. Under no circumstances shall any employee be entitled to more than one vacation in any one calendar year. It is likewise agreed that in the event the business requirements of the Company do not permit any particular employee to receive a vacation as in this article provided, the Company shall have the right to require said employee to continue work without such vacation, but in such event shall pay said employee double time at the base rate of pay for five working days, or ten working days as the case may be.

If a legal holiday occurs during an employee's vacation and said legal holiday by reason of the present Presidential proclamation or otherwise is a working day, then it shall not affect said vacation and shall be considered the same as any other working day on the other hand, if said legal holiday is a non-working day and falls within such employee's vacation period, then an extra day of vacation with pay at the base rate shall be given to such employee.

Section 3—Preference Based on Seniority

Vacation time preference shall be given to employees with the greatest length of service.

Section 4—Granted to Employees Laid Off

Any employee who quits or is discharged for cause will not be granted any vacation for which he is eligible at the time he is discharged. Whether or not the discharge is for cause shall be subject to approval of the Association, otherwise the employee

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)
shall be entitled to all vacation for which he or she is eligible.

Section 5—Vacation Period

The vacation period shall be between February 1st and November 30th, unless the Company for a good cause should permit an employee to take a vacation at a different time.

Section 6. In the event the Company feels that it is for the best interest, efficiency or health of any employee to take a vacation, it shall have the right to require such employee to do so. All working days of such vacation, however, to be paid for by the Company at the base rate of pay.

ARTICLE XII

COPY OF AGREEMENT TO ALL EMPLOYEES

The Company agrees at its own expense and as soon as is reasonably possible, after the execution hereof, to print and furnish each employee both present and future, with a copy of this agreement, together with copies of any and all amendments or additions thereto as soon as reasonably possible after said amendments or additions are made and executed.

ARTICLE XIII

APPLIES TO ALL ELIGIBLE EMPLOYEES

All provisions of this agreement shall apply equally to all eligible employees regardless of

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)
whether they are on hourly, weekly, or monthly basis.

ARTICLE XVI

LEAVE OF ABSENCE

A leave of absence without pay may be granted employees for a period not to exceed ten (10) working days during the year. For good and sufficient reasons, the Company may extend the period of leave not to exceed six months. The leave of absence shall not in any way jeopardize the employee's standing with the Company. Upon return from leave of absence, the employee shall be reinstated at a rate no lower than the one held previous to the leave.

ARTICLE XV

PERFORMANCE

Either party hereto shall be entitled to require specific performance of the provisions of this agreement.

The waiver of any breach or condition of this agreement by either party shall not constitute a precedent for any future enforcement or waiver of such breach or condition.

ARTICLE XVI

REPRESENTATIVE ACCESS TO PLANT

A duly authorized representative of the Association other than an employee shall have access to the

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

Company's plant during regular working hours when necessary for conducting an investigation of a grievance or for the purpose of investigating working conditions. Said representative or representatives shall obtain from the Company a specific authorization for each visit and such visits shall be subject to such regulations as may be made from time to time by the United States Army, the United States Navy, Federal Bureau of Investigation, and the Company. No Association business except as set forth herein and no solicitation of Association membership shall be conducted by said representative or representatives while in the plant as aforesaid.

ARTICLE XVII

NO REDUCTION OF WAGES

The Company agrees not to reduce the minimum rates above specified during the term of this contract and no employee shall suffer a reduction of wage rate as a result of the execution hereof.

ARTICLE XVIII

NO ADVANCEMENTS

No officer of the Association shall be advanced to a position making him ineligible for membership in the Association and that no officer shall resign from his position to accept a position making him ineligible for membership in the Association without the permission of the Board of Directors of the

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

Association. This limitation shall not be construed as preventing said officer or director from receiving an increase in wage rate.

ARTICLE XIX

EMPLOYEE MEANS ELIGIBLE EMPLOYEE

Whenever the word "employee" is used in the foregoing agreement without qualification, such word shall be deemed to mean an employee eligible for membership in the Association.

ARTICLE XX

COPY OF WAGE SCHEDULES TO BE DELIVERED

A copy of the Company's present classifications and wage schedules for such classifications shall be delivered upon the execution of this agreement to such officer of the Association as the Board of Directors of the Association may designate to be kept in the Association's files. Any changes made in such classifications or schedules shall be delivered to such officer forthwith upon the making of such changes.

ARTICLE XXI

WAGE SCHEDULE

It is hereby mutually agreed that this agreement does not deal with the question of the Company's wage schedules and that this agreement shall not

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

be construed as an agreement on the part of either the Association or the Company that said wage schedules have their approval. Due to the present regulations of the War Labor Board, War Manpower Commission, Presidential Decrees and Proclamations and other Governmental rules and regulations, no attempt has been made to negotiate the question of wages at this time, and that the right to re-open negotiations concerning wages is hereby reserved.

ARTICLE XXII

AGREEMENT SUBJECT TO LAWS AND REGULATIONS

That all of the provisions hereof are made subject to all laws, rules, regulations and governmental proclamations, and in the event any clause or paragraph hereof violates all or any of the said laws, rules, regulations, or governmental proclamations, said clause or paragraph shall be inoperative until said laws, rules, regulations or governmental proclamations are changed. The fact that any particular clause or paragraph hereof may be illegal shall not, however, have any effect on the remainder of this agreement.

ARTICLE XXIII

NOTICES

Wherever a notice is provided for herein, it shall be given by mailing the same to the Company at its place of business, 635 West Colorado Boulevard,

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

Glendale, California, and by mailing a copy to the Association in care of Pearson & Proctor, Attorneys at Law, 218 Security Bank Building, Burbank, California, or at such other place or places as the Association may designate from time to time by sending a notice thereof to the Company as hereinafter provided.

ARTICLE XXIV

NONASSIGNABLE

This agreement and all rights hereunder shall not be transferable or assignable by Kinner Motors Employees Association, Inc., to any other organization.

ARTICLE XXV

CONTROL OF PLANT

The Company has and will retain the exclusive right and power to manage the plant and direct the working forces, including the right to hire, suspend, discharge, promote, demote or transfer its employees, except as limited by this agreement.

ARTICLE XXVI

PATENTS

Except in case of employees engaged in research, development, experimental or engineering work, the Company shall not exact or require (including as to present employees and notwithstanding any present agreement they may have with the Company in regard thereto), as a condition of employment or as

(Testimony of Brian Charles Michael Johnson.)

Respondent's Exhibit No. 2—(Continued)

a part of its contract of employment, that any inventions or improvements made thereon by any employee shall belong to the Company. Nothing in this paragraph contained shall be deemed to constitute a waiver as to any employee of shop rights to which the Company would be entitled if this agreement had not been entered into.

In Witness Whereof, the parties hereto have executed this agreement by their representatives thereunto duly authorized on the day and year first hereinabove written.

KINNER MOTORS, INC.

By: EARL HERRING

President

By: VICTOR SEMRAU

Secretary

KINNER MOTOR EMPLOYEES
ASSOCIATION, INC.

By: ROB'T L. STEVENS

President

By: VERA ALLEN

Acting Secretary

WALTER E. SIGAFOOSE

JAMES F. BROWN

JOHN WILLIAMS

KENNETH P. ENLOWS

LAWRENCE B. BROWN

FLOYD C. PARR

WM. J. EVERS

Directors.

ROSS NICHOLS,

called as a witness by and on behalf of the Company, being first duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Collins): In your layoff of Mr. Davis, was that in any way caused by the fact that Mr. Davis appeared here before the National Labor Relations Board in the previous hearing that has been referred to?

Mr. Esterman: That is objected to as calling for a conclusion of the witness; calling for matter which is solely within the province of the Trial Examiner of the National Labor Relations Board to decide.

Trial Examiner Spencer: I don't have a hearing that that question is not asked. I always take the answer. Overruled. I will take the answer.

The Witness: No.

Trial Examiner Spencer: I call it a categorical denial.

Q. (By Mr. Collins): I will ask you whether or not the layoff of Mr. Davis was caused in any manner by reason of the fact he participated in the previous hearing before the National Labor Relations Board? [825]

Mr. Esterman: To which I interpose the same objection.

Trial Examiner Spencer: Of course, this witness can answer only insofar as he himself was involved in the layoff. You can't ask for somebody else.

(Testimony of Ross Nichols.)

Mr. Collins: No, no. I mean by "him," he was the one that instituted it. He can't; that is right.

Q. (By Mr. Collins): Now, may I ask you, Mr. Nichols, was such layoff caused in any way by reason of any union activity at any time?

A. No.

Mr. Esterman: To which I interpose the same objection.

Please give me a chance to object, Mr. Nichols.

Trial Examiner Spencer: Overruled.

Q. (By Mr. Collins): Now, will you answer my question? A. No.

Q. Now, as to Mr. Swope. Was his layoff caused in any manner by reason of any union activity of any kind on the part of Mr. Swope? A. No.

Mr. Esterman: To which I interpose the same objection.

Trial Examiner Spencer: Overruled.

Mr. Collins: Can't we have that objection——

Mr. Esterman: I propose to have these objections to [826] show to the questions.

Trial Examiner Spencer: Does this involve a line of inquiry along the same line as to each employee?

Mr. Collins: Yes.

Trial Examiner Spencer: You may have the objection to the line of inquiry. If you come to a question you don't want to object to, call it to my attention. You will have an objection until you call my attention to the fact you are not objecting.

Mr. Esterman: Thank you.

(Testimony of Ross Nichols.)

Q. (By Mr. Collins): Was the discharge of Swope caused in manner because he was here on an occasion or occasions in this court room during the hearing of the previous time here before the National Labor Relations Board? A. No.

Q. Was the layoff of Swope caused in any manner by reason of the fact that he assisted in preparing or making any preparations in connection with the previous hearing before the National Labor Relations Board?

A. No; nothing only the lack of work, was all.

Q. Was the layoff of Swope caused in any manner by reason of any union activities on his part?

A. No, none whatever.

Q. Now, as to Mr. Gilpin, was the layoff of Gilpin caused in any manner by reason of any union activity? [827] A. No.

Q. Was the layoff of Gilpin caused, in any manner, because he was present here in the court room before the National Labor Relations Board at the last hearing? A. No, sir.

Q. The previous hearing, I should say.

A. No. [828]

EMMETT J. SULLIVAN,

called as a witness by and on behalf of the Company, being first duly sworn, was examined and testified further as follows:

Direct Examination

Q. Now, when did you first learn about the fact that any [861] statements had been made by Davis, Gilpin or Swope in connection with war bonds?

A. That was on the night of the 28th of February.

Q. Who told you?

A. I was in the canteen at Plant No. 2.

Q. What did Mr. Johnson—did you have a conversation with Mr. Johnson about it? A. Yes.

A. Who were present?

A. A number of employees were in the canteen. I was sitting at a far corner table having a cup of coffee, and Johnson came in and sit down.

Q. Who participated in your conversation?

A. Johnson and myself only.

Q. What was said?

Mr. Esterman: May I, at this point, interpose an objection on this ground: That the conversation the witness is about to relate is not material or relevant to the conversation between the personnel manager and the foreman of the company out of the presence of any of the persons here involved, and that so far as I am concerned the best purpose it can serve is self-serving.

Mr. Colins: If I might say—— [862]

(Testimony of Emmett J. Sullivan.)

Trial Examiner Spencer: The objection is overruled.

Q. (By Mr. Collins): What was said?

A. Johnson said, "Sully, I think there is something you ought to know."

I said, "Yes, what is it?"

He said, "Since these three tool room boys have been let out, several of my people have come to me and said that they were glad to see them go."

I said, "Why"?

He said, "Well, they have been going around to these employees making statements regarding the war bonds having no value and they are foolish to buy them, they won't be worth anything after the war. And there are some of them plenty sore about it."

I said, "If that is true I would like to have you get what you can in writing from these various people, so we can give it a full investigation."

He said, "O.K. I will see what I can do." And he went back to the plant, Plant 1. A few minutes later I, myself, went over to Plant 1——

Mr. Esterman: Has he finished the conversation?

Q. (By Mr. Collins): Have you finished all the conversation?

A. Yes, that is the end of the conversation as it took place in the canteen.

Mr. Esterman: I understood the question went to a [863] conversation.

Mr. Collins: All right. I will ask another question.

(Testimony of Emmett J. Sullivan.)

Q. (By Mr. Collins): Did anything transpire after that?

A. I went over to Plant 1 shortly afterward and talked with Brian for a few moments, to impress him with the necessity of his doing what I asked him to do with regard to statements that night, and to be sure, if he got any, to bring them to my office before he went to work the next day.

Q. Was there anything else said at that time?

A. That was the conversation.

Q. What did he do about the statements?

A. He immediately left the plant and went home. The next day when Brian Johnson came to work, late that afternoon, he came to my office and handed me the statements which are in evidence.

Q. Did you have any talk with him at that time?

A. Yes, he said there were several others that would not sign the statements, but their conversations to him and their information given to him was in the same respect as the information written on the statements.

Q. Did he say anything to you in connection with the feeling of any of the employees?

A. In connection with what?

Q. The feeling of the employees as expressed to him about the matter. [864]

Mr. Esterman: This is certainly objected to no matter what the answer would be. It would be the rankest kind of hearsay.

Trial Examiner Spencer: I will take the conversation. You may give us what he said to you.

(Testimony of Emmett J. Sullivan.)

The Witness: He said, "Yes, big John Szabo was ready to let him have one." And he didn't want any trouble and it was sure a good thing we nipped this thing in the bud. That is just like he said it. [865]

Cross Examination

Q. (By Trial Examiner Spencer): Mr. Sullivan, what distinction do you make between the terms "layoff" and "discharge," if any?

A. A layoff we use when the company is forced to temporarily discontinue the services of an employee. A discharge is a permanent separation. A quit is a permanent separation and the only other one we have is the leave of absence. We have those four.

Q. Now, Mr. Sullivan, it is not very clear in my mind why, if on February 28th you had no information that Swope, Gilpin or Davis was seeking reinstatement, you would get these statements about talk on bonds. Maybe you could clarify that in my mind.

A. Well, may I lay a little foundation for that in my answer?

Q. Yes.

A. I have been in charge of the war bond drives at Kinner's since I have been there. We have an enviable reputation in the selling of war bonds at Kinner's. I have the Treasury Department citation for the 100 percent cooperation in the sale of war bonds. We go to quite an expense [890] in setting up exhibits and putting on a show for the sale of

(Testimony of Emmett J. Sullivan.)

war bonds. For the Fourth War Bond we were awarded the Treasury Department Minute Man flag with the T and the star. We were successful in obtaining more than 90 percent of our employees on the payroll for deductions. And the star was for the sale of extra war bonds to every employee over and above his regular payroll deductions. I have a letter from the Treasury Department that we are very proud of. We had photostatic copies of it made and sent to every department; many of them have them framed in their offices. We are 100 percent war bond minded. So it hit me a little personally when I discovered that there was anything in the plant occurring that could be harmful to the sale of war bonds to our employees. That is the only reason that when I—it came to my attention I became concerned about it, to the extent of asking Mr. Johnson to endeavor to get written statements from those employees in question.

Trial Examiner Spencer: Do you have any further questions, Mr. Esterman?

Mr. Esterman: Yes, I do.

Cross Examination

Q. (By Mr. Esterman): In the light of your explanation of the difference between layoff and discharge, I would like to ask you, Mr. Sullivan, if it was the intention of the company, or if it was in your mind at the time that either [891] Davis, Gilpin or Swope were laid off to call them back at some future time?

(Testimony of Emmett J. Sullivan.)

A. They were eligible for rehire to the company, if and when there was work available of their classification.

Q. Was it your intention to call them back at some future time?

A. Well, they were eligible for that.

Q. Did you have that in mind at the time?

A. Well, they were eligible for that. We usually dismiss those things from our minds. The man goes to work the next day, he doesn't come back, very rarely. If he had come back and there hadn't been this thing come up in the interval he would have had full privileges that are accorded to any other employee that has been laid off and comes back and asks for reinstatement. [892]

A. C. McGRAW,

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Esterman): State your name.

A. A. C. McGraw.

Q. For the record will you state your position?

A. I am business agent for Lodge 758, International Association of Machinists.

Q. That is the organization which filed the charge in this case? A. It is.

(Testimony of A. C. McGraw.)

Q. How long have you been acting in that capacity? A. Since March of 1943.

Q. Let me understand you. Since March of last year you have been business agent?

A. Since 1943.

Q. Of Lodge 758?

A. Of Lodge 758; that is correct.

Q. Calling your attention to the month of February, 1944, did you, in your capacity as business agent and in connection with your efforts to organize the Kinner plant, have issued or cause to be issued any union literature? [904]

A. Yes, we did.

Q. I will show you a document which has been identified and marked for identification as Board's Exhibit 15, and ask you if you had this document in mind when you spoke of union literature (indicating)?

A. Yes, this was distributed on February 9th at the change of shifts in the afternoon.

Q. By whom, please?

A. By myself and Brother Ickes, our Grand Lodge representative.

Q. At Kinner Motors' plants?

A. That is right, at the gate between the personnel office and the clock house.

Q. Did you distribute them at more than one time that day?

A. No, between shifts, one shift came off and another shift went on. We had approximately an hour and we caught both shifts.

(Testimony of A. C. McGraw.)

Q. Whom, in your organization, determined how many of these should be—are they mimeographed?

A. Yes, they are mimeographed.

Q. I will ask you did you decide on how many to be mimeographed?

A. Yes, we did. We mimeographed one ream, which is approximately 500, and we distributed approximately 300.

Q. When you say “we,” you mean yourself and Mr. Ickes? [905]

A. That is correct.

Q. Mr. Ickes is an official of the union?

A. He is, Grand Lodge representative.

Trial Examiner Spencer: You distributed approximately 300 where?

The Witness: At the gate between the personnel office and the clock house.

Trial Examiner Spencer: Of Kinner Motors Company?

The Witness: Yes. [906]

JAMES MACON DAVIS,

a witness called by and on behalf of the National Labor Relations Board, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

Trial Examiner Spencer: You have previously been sworn and you are still testifying under oath.

Q. (By Mr. Esterman): You were present, were

(Testimony of James Macon Davis.)

you not, Mr. Davis, when Vera Allen testified in this hearing? A. Yes, sir.

Q. Do you recall her testimony with reference to soliciting you for the purchase of war bonds?

A. Yes, sir.

Q. So that the record may be clear, was there more than one time when she solicited you for war bonds? A. No, sir; one time.

Q. With respect to that one time, can you indicate approximately when it was or in connection with what drive?

A. It was, I believe, the fourth war bond drive. I wouldn't be positive about it. It was somewhere around December or January.

Q. You mean December of 1943 or January of 1944. A. Something in that neighborhood.

Q. Did you have a conversation with her in which, at least in part, she asked you to buy war bonds at that time? [907] A. Yes, sir.

Q. Will you relate the conversation?

A. I was walking in front of the tool crib, which is located in the center of the building, and I met Miss Allen coming up the aisle. She asked me if I would buy extra war bonds in that drive.

Q. Go ahead, tell us the whole conversation.

A. And I told her that I didn't feel like I was able to add to what I was already buying at the time.

She says, "Have you been buying more than you bought at Kinner?"

(Testimony of James Macon Davis.)

I said, "I am going to buy more." My son was run a short time ago by an automobile and received compensation from the insurance company, which he wanted to spend for stamps or bonds.

She said, "Why not buy them from Kinner?"

I said I didn't want to rob him of the opportunity of buying them from his school. He was in kindergarten.

Q. Have you related all of that part of the conversation which bore on the discussion of your son's money? Was there anything said between you and Miss Allen about a penny bank?

A. No, sir; nothing.

Q. Did you tell her they wouldn't be worth a weren't worth a nickel? A. I did not. [908]

Q. Did you tell her they wouldn't be worth a nickel? A. I did not.

Q. Did you ever tell anyone at the Kinner plant that war bonds wouldn't be any good after the war?

A. I told Mr. Dayhoff at one time that I didn't know whether they would be any good after the war or not, since the war bonds in the first war were not redeemed at full price and this was a much bigger debt at this time than it was before.

Q. Was that during the course of a discussion with Mr. Dayhoff? A. That was.

Q. Were there other things said during that conversation?

A. Yes, I believe there was, the discussion of the value of price of gold.

(Testimony of James Macon Davis.)

Q. Mr. Dayhoff came to you or did you go to him, if you know, at that time? Did he approach you or did you approach him?

A. He was standing close to the tool crib at his machine, and I was passing on the way to the men's room. I very seldom passed without saying something or speaking to Mr. Dayhoff.

Q. You talked to him many times?

A. Many times.

Q. Are you personally acquainted with Mr. Gerth, who testified in this case? [909]

A. Yes, sir.

Q. How long have you known him?

A. I have known Mr. Gerth, I believe, ever since I have been on the night shift, or I will say I have known him for a year, at least.

Q. Did you ever have any discussions with Mr. Gerth on the subject of unions? A. Yes, sir.

Q. More than one?

A. Well, I recall one in particular. [910]

Q. (By Mr. Esterman): I started to ask you when you had this conversation with Mr. Gerth about unions. A. It was some time in January.

Q. 1944?

A. I would say the latter part of January, 1944, or the first of February.

Q. Was anyone else present? A. No.

Q. Was this in the Kinner plant?

A. Yes, sir.

Q. What was said by you or him, if anything, on the subject of unions at that time?

(Testimony of James Macon Davis.)

A. I was passing his machine, which is right near the aisle, and I said, "Mr. Gerth, it looks like we are getting along pretty good in our drive for union membership. We might be represented by the A. F. of L. before long."

Mr. Gerth says, "I don't agree with you." He says, "Knowing the company executives as I do, they will close the plant before they will allow any such union in this building." [911]

Q. (By Mr. Esterman): Calling your attention to the date Mr. Gerth testified in this hearing, did he stop and speak to you after he left the stand?

A. Yes?

Q. What did he say to you?

Mr. Collins: I object to that as incompetent, irrelevant and immaterial; not proper rebuttal.

Trial Examiner Spencer: The objection is overruled.

The Witness: On his way from the stand back to the back of the room he stopped and touched me on the shoulder and said, "Jim, I am sorry I had to do this to you."

Q. (By Mr. Esterman): Is that all that was stated at that time? [913]

A. Yes, sir.

Q. Did you say anything?

A. I did not.

[914]

(Testimony of Richard Arthur Swope.)

(The record was read.)

Mr. Collins: I will withdraw my objection.

Trial Examiner Spencer: Proceed.

The Witness: Later, during the third war loan drive, the period which Mr. Szabo referred to in his testimony——

Q. (By Mr. Esterman): Keep your voice up.

Mr. Collins: I can't hear you.

The Witness: And again during the third war loan drive, [919] which is the time that Mr. Szabo was referring to during his testimony.

Q. (By Mr. Esterman): Well, so we will fix the time, do you recall when it was you were solicited by Mr. Johnson in connection with the third war loan drive?

A. I don't recall the time. It was during the third war loan drive and he asked me if I would increase my deduction at the time.

Q. I was about to ask you, first, if you are going to tell us about some conversations. Let me ask you some question first, please. A. All right.

Q. Were you solicited in connection with the third war loan drive by Mr Johnson, in the plant?

A. Yes, I was.

Q. In the tool room?

A. No, I wasn't working in the tool room at the time.

Q. You were in the tool room?

A. I was not working.

Q. Where were you working?

(Testimony of Richard Arthur Swope.)

A. I was working, as I remember, right across the aisle on the radial drill. I believe Mr. Szabo was workin on a milling machine at the time.

Q. Did you and Mr. Johnson then engage in a conversation about war bonds? [920]

A. Yes, we did.

Q. Was anyone present or within earshot?

A. Only Mr. Szabo, who was working near us.

Q. Tell us what the conversation was.

A. He asked me if I wouldn't increase my deduction. I told him I didn't know at the time whether I could, but I would take a blank.

Q. Tell us the conversation.

A. And if I could I would certainly do it.

Q. What did he say, if anything?

A. He was in a hurry and left. He didn't say anything more.

Q. Did you take a blank from him?

A. Yes.

Q. Did you fill it in?

A. Later than evening some of the other employees and I talked about it, and agreed that it would be very little to increase, so I increased my deductions from \$6.50 a pay day to \$10.00.

Q. Is that each week?

A. Each pay day; semi-monthly.

Q. There are two pay days a month?

A. That is right.

Q. Did you then notify the management you were having your deductions increased? [921]

A. I filled the form out and handed it to Mr. Johnson later that week.

LEWIS GILPIN,

a witness called by and on behalf of the National Labor Relations Board, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

Trial Examiner Spencer: Mr. Gilpin, you are still testifying under oath. Do you understand that?

The Witness: Yes.

Q. (By Mr. Esterman): Were you here the day Mr. Szabo testified? A. I was.

Q. Were you acquainted with him during the time you were at Kinner's?

A. Just partially.

Q. Well, you had better explain what you mean by that. I don't know if I understand.

A. I knew him, and that is all.

Q. You knew who he was?

A. Yes, that is all. [922]

Q. Did you ever have any conversations with him about war bonds?

A. Not as I know of, no.

Q. Or did you ever have any conversations with him at the plant? A. No.

Q. Did you ever talk to him about blood donations? A. No.

Q. Did you ever tell anyone at the Kinner Motors, Inc., that the Red Cross sold the blood which was donated to it? A. No.

Mr. Esterman: That is all.

Mr. Collins: That is all.

(Testimony of Lewis Gilpin.)

Trial Examiner Spencer: The witness is excused.

(Witness excused.) [923]

[Endorsed]: No. 10984. United States Circuit Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Kinner Motors, Inc., Respondent. Transcript of Record. Upon Petition for Enforcement of an Order of the National Labor Relations Board.

Filed February 12, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Nos. 10956 and 10984

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

ON PETITIONS FOR ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Circuit Court of Appeals for the Ninth Circuit

Nos. 10956 and 10984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

ON PETITIONS FOR ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

These cases are before the court on petitions of the National Labor Relations Board for the enforcement of two orders issued against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151, *et seq.*).¹ This

¹ The first of two orders was issued in the proceeding known as *In the Matter of Kinner Motors, Inc. and International Association of Machinists, District Lodge No. 94, for and on behalf of Lodge No. 311, A. F. L.*, Case No. 21-C-2307. The Board has

Court has jurisdiction under Section 10 (e) of the Act,² the unfair labor practices having occurred at Glendale, California, within this judicial circuit.

STATEMENT OF THE CASE

Upon proceedings had pursuant to Section 10 of the Act, the Board, on July 22, 1944, issued its decision in Case No. 21-C-2307 containing its findings of fact, conclusions of law and order (57 N. L. R. B. 622),³ and on December 13, 1944, issued its decision

requested enforcement of this order in No. 10956 in this Court. The second of the two orders was issued by the Board in the proceeding known as *In the Matter of Kinner Motors, Inc. and International Association of Machinists, A. F. L.*, Case No. 21-C-2389. The Board has requested enforcement of its order in this second proceeding in Case No. 10984 in this Court. References to the transcript of record in the first proceeding (No. 10956 in this Court) are made by the symbol "I"; references to the transcript of record in the second proceeding (No. 10984 in this Court) are made by the symbol "II." For convenience we are referring to the charging union herein, the International Association of Machinists, A. F. L., as the Union.

² The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 32-35.

³ Respondent's contention (I. 74) that the proviso to the Board's appropriation for the fiscal year ending June 30, 1944 deprived the Board of jurisdiction to proceed with Case No. 21-C-2307 is wholly without merit, as the Board found (I, 14, n. 1). The proviso prohibited the Board's expenditure of any funds appropriated to it for that fiscal year, in connection with complaint cases where an agreement between management and labor had been "in existence for three months or longer without complaint being filed" (see Appendix, p. 35, *infra*). Since this limitation upon the Board's spending power expired on June 30, 1944, respondent cannot, of course, possibly rely upon it now, as precluding the Board from using its current funds in connection with

in Case No. 21-C-2389 containing its findings of fact, conclusions of law and order (59 N. L. R. B. No. 175).⁴

THE BOARD'S FINDINGS OF FACT

1. *The business of the respondent.*—Respondent, a California corporation, owns and operates two plants at Glendale, California, where it is engaged in the manufacture of aircraft engine parts and the assembly of aircraft engines. During 1943, respondent purchased raw materials valued at more than \$7,000,000, of which materials valued at more than \$3,000,000 were transported to respondent's plants from points outside California. During the same period respondent sold and distributed finished products valued at more than \$3,000,000, of which amount finished products valued at more than \$500,000 were made for delivery and were delivered, by respondent to points and persons outside the State of California (I. 25, II. 21-22).⁵

the case. The proviso to the Board's appropriation for the current fiscal year clearly has no application to the case at bar for it specifically excludes unions formed in violation of Section 8 (2) of the Act from its operation (see Appendix, pp. 34-35, *infra*). In any event, the propriety of the Board's expenditure of its appropriation is a matter between the Board, Congress, and the Comptroller General with which this Court will not concern itself in this proceeding. *N. L. R. B. v. Baltimore Transit Co.*, 140 F. (2d) 51, 58 (C. C. A. 4); *N. L. R. B. v. National Tool Co.*, 139 F. (2d) 490 (C. C. A. 6); *N. L. R. B. v. Thompson Products, Inc.*, 141 F. (2d) 794 (C. C. A. 9.); *N. L. R. B. v. Cowell Portland Cement Co.* (without opinion), decided September 9, 1943 (C. C. A. 9).

⁴ In both decisions the Board adopted the findings, conclusions, and recommendations of the Trial Examiner, with certain additions (I. 14, II. 14).

⁵ Respondent stipulated at the hearing that it is engaged in interstate commerce within the meaning of the Act (I. 12-13).

2. *The unfair labor practices.*—In Case No. 21-C-2307 the Board found that respondent had dominated and interfered with the formation and administration of Kinner Motor Employees Association, Inc. (herein called the Association) and had contributed financial and other support to it, thereby violating Section 8 (1) and (2) of the Act (I. 14-18, 26-34). In Case No. 21-C-2389 the Board found that respondent had discharged Richard Arthur Swope, James Macon Davis, and Lewis Gilpin because of their union membership and activities, and, in the case of Davis, for the further reason that he had testified at the Board hearing in the prior case, thereby violating Section 8 (3), (4), and (1) of the Act (II. 22-44).

THE BOARD'S ORDERS

In addition to the usual provisions requiring respondent to cease and desist from the unfair labor practices found, to post appropriate notices, and to furnish requisite compliance reports (I. 19, 20, II. 16-17, 18), the Board, in Case No. 21-C-2307, ordered respondent to cease and desist from giving effect to its contract with the Association and to withdraw all recognition from and completely disestablish the organization as the bargaining representative of its employees (I. 19, 20), and in Case No. 21-C-2389, directed respondent to reinstate Swope, Gilpin, and Davis with back pay (II. 17-18).

SUMMARY OF ARGUMENT

I. The Board's findings of fact with respect to the unfair labor practices are supported by substantial evidence. On the facts found, respondent has engaged in

and is engaging in unfair labor practices within the meaning of Section 8 (1), (2), (3), and (4) of the Act.

II. The Board's orders are valid and proper.

ARGUMENT

POINT I

The Board's findings of fact are supported by substantial evidence. Upon the facts found respondent has engaged in and is engaging in unfair labor practices in violation of Section 8 (1), (2), (3), and (4) of the Act

A. Respondent's interference with and domination and support of the Association

1. *The facts*

The Union began its attempts to organize respondent's employees during the early part of March 1943 (I. 104-105). Shortly after the institution of these organizational efforts, Roy C. Walker, assistant to Brian C. Johnson, night foreman in Plant No. 1,⁶ obtained permission from Johnson to talk to the men on the night shift concerning the formation of an independent organization. In his talk to the men Walker referred to the fact that "the A. F. of L. was handbiling us at the gate," and stated that "we were going to have some sort of an organization pretty soon" and that he "thought it would be a good idea if we had one of our own" (I. 223, I. Tr.⁷ 334). Foreman Johnson was present during Walker's talk (I. Tr. 335).

⁶ Walker was in charge of the night shift on Foreman Johnson's night off each week (I. 218-221, 260).

⁷ This reference is to the original typewritten transcript of testimony before the Board heretofore filed in this Court.

Shortly thereafter Leadman John Williams conferred with Leadmen Howard Sharrar⁸ and Orville Gilbert concerning the formation of an independent union, and following a conference with an attorney, these three leadmen, on March 22, 1943, signed articles of incorporation for the Association (I. 102, 105-106).⁹

Thereafter Williams and his two associates had cards printed bearing the following text (I. 167):

I, the undersigned, hereby designate and appoint Kinner Motors Employees' Association, Inc., as my exclusive bargaining agent under and by virtue of the terms of the National Labor Relations Act.

These cards were given by Williams to other leadmen, who distributed them among the employees and obtained employees' signatures thereon in the plant during working hours (I. 107, 194-195, 207-208, 211, 232-233, 224). Foreman Johnson and Supervisor Kroening¹⁰ also handed out these cards to employees and solicited employees' signatures (I. 182, 256).

⁸ Sharrar was subsequently promoted to be night superintendent of Plant No. 2, (I. 130, 145).

⁹ We discuss respondent's contention that it is not answerable for the activities of its leadmen at pp. 12-13, *infra*.

¹⁰ Kroening was in charge of the testing of motors and had from 3 to 9 employees under him doing test work. He instructed new employees in this work, checked the engines being tested by the employees under him, recommended them for wage increases, and generally oversaw testing work (I. 248-250). The Board very properly found (I. 14, 28-29, 33-34) that Kroening's position and duties were such that employees reasonably considered his Association activities as having the approval and support of management and that respondent was therefore accountable for them. See pp. 13-14, *infra*.

The first general meeting of the Association was held April 16, 1943. At the request of Leadmen Williams and Sharrar, R. L. Stevens, respondent's receiving clerk, acted as temporary chairman (I. 149, 151). At the second meeting, on April 23, Stevens was elected president of the Association (I. 157). He continued in office until the following December, despite the fact that about a week after his election he was promoted and placed in charge of the Receiving Department (I. 145-146, 157). Christine Jagoe, Secretary to Personnel Manager Sullivan, acted as secretary at the first Association meeting (I. 167-168). Thereafter, Rose Minor, also employed in the personnel office and in charge of employee insurance and personnel records, became secretary of the organization (I. 168). Despite the adoption of bylaws which rendered her ineligible to continue in office, she remained as secretary (Int. Exh. 1, I. 168-169).

In May, respondent entered into negotiations with the Association which culminated on June 16, 1943, in a contract recognizing the Association as the exclusive bargaining agent of its employees with certain exceptions, and covering working conditions generally, but not dealing with the vital subject of wages (Bd. Exh. 6). Thereafter copies of the contract were printed at respondent's expense and distributed to all employees whether members or not (I. 170-171). Bound within the covers of the contract were two detachable cards, one an application for membership in the Association and the other authorizing the re-

spondent to make certain deductions monthly and to pay the deductions to the Association (Bd. Exh. 6).

Copies of the Association contract including the above-mentioned enclosures were handed to new employees together with other material incidental to their employment, such as group insurance literature, by Association Secretary Jagoe, as part of her duties in respondent's personnel office (I. 170-171).¹¹ The effectiveness of this device as a "membership-getter" is attested by the testimony of Association President Stevens that the organization continued to receive signed-up membership applications, apparently without any solicitation on the part of the Association (I. 163).

In July, in an obvious effort to enhance the prestige of the Association, respondent permitted the organization to take credit for obtaining a wage bonus, which respondent unilaterally conferred upon the night shift workers. Thus, early in July respondent allowed the following notice to be placed on the plant bulletin boards (I. 161):

NOTICE TO NIGHT SHIFT EMPLOYEES

Please be advised that commencing immediately a bonus for night shift employees of five cents an hour will be paid by Kinner Motor Company, Inc., in accordance with the terms of the contract recently executed by and between

¹¹ It is significant that while Jagoe informed new employees that participation in the group insurance plan was purely voluntary, no such assurance was given with respect to the joining of the Association (*ibid.*).

Kinner Motor Company, Inc., and Kinner Motor Employees Association, Inc.

Please be further advised that this bonus has been approved by the War Labor Board.

KINNER MOTOR EMPLOYEES ASSOCIATION,
INC.

By RORT. L. STEVENS, *President*.

Although the contract did not obligate respondent to pay the wage bonus, respondent took no steps to repudiate this false claim, but on the contrary, as we have seen, permitted it to be given publicity on bulletin boards in the plant. In sharp contrast is respondent's conduct shortly thereafter when a rumor became prevalent that an affiliated union had been instrumental in obtaining higher wages for respondent's plant guards. On this occasion respondent promptly posted a notice for the express purpose of "correcting mistatements that are being made in the plant with reference to present wage raises" in which it flatly declared that "No Organization Had Anything To Do With Granting Of The Present Increases" (I. 161-162).

Respondent thereafter continued to lend weighty support to the Association. During the summer respondent permitted the employees on the night shift to elect a steward on the plant premises during working hours and in the presence of Foreman Johnson (I. 212-215, I. Tr. 453). Leadman Cadaret, who was elected steward at this election, thereafter attended Association meetings on company time without "punching out" his time card (I. 215-216). In No-

vember, Personnel Director Sullivan, in the course of a speech to the night shift employees, advised them that the Association had been organized for them and that he thought that it was best for them to join (I. 188-189).

2. The illegality of respondents conduct under Section 8 (2) and (1) of the Act

Upon the foregoing facts the Board very properly found (I. 14, 34) that the respondent had "dominated and interfered with the formation and administration of the Association and has contributed financial and other support to it, in violation of Sections 8 (1) and (2) of the Act." As we have seen (*supra*, p. 5), shortly after the employees had commenced to organize through the Union, the formation of an independent organization was advocated by an assistant foreman in a speech to the night shift employees which was made in the plant, with the consent of the foreman in charge.¹² Respondent's leadmen thereafter openly espoused the formation of the Association, urging employees to join in the plant during working hours, and in this they were assisted by certain of respondent's foremen and other supervisory employees (*supra*, pp.

¹² The fact that the formation of an independent union was not thought of until a nationally-affiliated union appeared on the scene strongly suggests that the proponents of the organization were more interested in forestalling a nationally-affiliated organization than in fashioning for themselves an effective instrument for collective bargaining. This and other courts have been quick to recognize the significance of this factor. *N. L. R. B. v. Bradford Dyeing Association*, 310 U. S. 318, 336; *N. L. R. B. v. J. G. Boswell Co.*, 136 F. 2d 585, 593 (C. C. A. 9); *N. L. R. B. v. Tovrea Packing Co.*, 111 F. 2d 626, 629 (C. C. A. 9).

6-10). The foregoing facts alone amply support the Board's finding that respondent has unlawfully interfered with and dominated the Association, as this and other courts have held. *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 590, 591-592; *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514, 518-519; *N. L. R. B. v. J. G. Boswell Co.*, 136 F. 2d 585, 593-594 (C. C. A. 9); *N. L. R. B. v. Germain Seed and Plant Co.*, 134 F. 2d 94, 96-99 (C. C. A. 9); *N. L. R. B. v. Idaho Refining Co.*, 143 F. 2d 246, 248 (C. C. A. 9); *N. L. R. B. v. Gilfillan Bros., Inc.*, decided April 21, 1945 (C. C. A. 9).¹³

In addition to dominating and interfering with the Association, as above described, respondent openly assisted the organization in various ways. Thus re-

¹³ The Board's conclusion that respondent has interfered with and dominated the Association finds further confirmation in the fact that the organization was largely left in the hands of persons having supervisory status or who were closely allied to the management. The first president of the Association, as we have noted (*supra*, p. 7), continued to serve many months after he was named head of the Receiving Department and the secretary of the organization remained in office notwithstanding the fact that she served in a confidential capacity to Personnel Director Sullivan and was ineligible to membership under the constitution and by-laws of the Association; at least two members of the Board of Directors of the Association were leadmen. Since the placing of persons closely allied with the management in positions of responsibility in a union creates a formidable obstacle to genuine freedom of action on the part of the union and raises a serious question as to its independence, the Board properly gave weight to this factor in appraising the Association and respondent's relations with it. Cf. *N. L. R. B. v. J. G. Boswell Co.*, 136 F. 2d 585, 593 (C. C. A. 9); *N. L. R. B. v. Germain Seed and Plant Co.*, 134 F. 2d 94, 96-99 (C. C. A. 9); *N. L. R. B. v. Idaho Refining Co.*, 143 F. 2d 246, 248 (C. C. A. 9).

spondent greatly aided the Association's efforts to sign up new members by distributing among all new employees copies of the contract containing detachable membership applications and dues check-off authorizations (*supra*, p. 8). Respondent's disparate treatment of the claims of the two labor organizations in connection with the night shift bonus and the wage increase for the plant guards (*supra*, pp. 8-9), plainly "enhanced the prestige and efficacy of the Association as a bargaining representative and thereby assisted it in maintaining and increasing its membership," as the Board found (I, 17-18). Respondent further assisted the Association by permitting the employees on the night shift to elect a steward in the plant during working hours and by allowing Leadman Cadaret to leave his work without loss of pay to attend Association meetings (*supra*, p. 9). There is thus an ample basis for the Board's finding (I. 17, 18) that respondent, in violation of Section 8 (2) and (1) of the Act, rendered "powerful support" to the Association and "assisted it in maintaining and increasing its membership." See cases cited at p. 11, *supra*.

The Board properly rejected respondent's contention that it was not answerable under the Act for the activities of its leadmen. While the Board, because of the abundant evidence that the efforts of the leadmen on behalf of the Association had respondent's full support and assistance, found it unnecessary to determine the full extent of their supervisory powers the record, as the Trial Examiner noted in his intermediate report (I. 33, n. 12), contains persuasive evidence that leadmen possessed such powers. Thus it

appears that the leadmen were in charge of various groups of men, distributed work to the men in their groups, and gave them instructions as to the time, place, and manner of performance of their duties (I. 99–101, 122–125, 131–134). At regular intervals they checked the quality of the work being turned out at the machine, checked blueprint tolerances and generally oversaw operations (I. 100, 124–125). If the men were desirous of wage increases, they often spoke to leadmen about them and occasionally leadmen made recommendations for higher remuneration (I. 127). Leadmen did not themselves hire or discharge employees, but they had power to and did recommend the discharge of employees working under them, and such recommendations were given serious weight (I. 123–125). Leadmen were paid an hourly wage rate appreciably in excess of that paid to men in their groups (I. 100, 122). From the foregoing and from respondent's support and approval of their activities in connection with the Association it is clear that the employees as a whole were justified in inferring, as they in fact did, that the leadmen spoke for and represented the management in their activities on behalf of the Association. Respondent therefore is liable for their conduct under the controlling decisions of the Supreme Court. *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 79–80; *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 599; *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514, 520–521; *N. L. R. B. v. Pacific Gas and Electric Company*, 118 F. 2d 780, 787 (C. C. A. 9).

The respondent is not exculpated from liability for the activities of its leadmen merely because they were eligible to join the Association and may also have been eligible to join the Union. The test of employer liability as the Court noted in the *Pacific Gas* case, *supra*, is whether the employees "would have just cause to believe" that the leadmen "were acting for and on behalf of the management" (118 F. 2d, at 787). Since in this case it is clear that the employees had ample reason to believe that the leadmen were acting for respondent, respondent is answerable for their conduct whether or not they were eligible for membership in either the Association or the Union. See *Pacific Gas and Electric* case, *supra*, 118 F. 2d, at 788; *N. L. R. B. v. Aintree Corp.*, 132 F. (2d) 469, 472 (C. C. A. 7), cert. denied, 318 U. S. 774; *N. L. R. B. v. Skinner and Kennedy Stationery Company*, 113 F. 2d 667, 671 (C. C. A. 8); *N. L. R. B. v. Christian Board of Publication*, 113 F. 2d 678, 682 (C. C. A. 8).

B. Respondent's discriminatory discharge of Swope, Davis, and Gilpin

Respondent terminated the employment of Richard Swope on February 17, 1944, and James Davis and Lewis Gilpin on February 23, 1944. While respondent contended before the Board that these men merely had been laid off for lack of work, the Board found (II. 35) that the men had in fact been discharged because of their union affiliation and activities, and in the case of Davis, for the further reason that he had testified in the prior Board hearing. Accordingly, the Board concluded (II. 46) that respondent's conduct in this regard violated Section 8 (1), (3), and

(4) of the Act. These findings and conclusions are fully supported by the evidence, as we shall demonstrate.

Richard Swope, an experienced mechanic, entered respondent's employ in June 1940, as a machine operator (II. 298-299). James Davis, an experienced machinist (II. 240-243), was hired by respondent in October 1941, and was first employed in the sub-assembly of aircraft engines (II. 237-238). Lewis Gilpin, a machinist of many years' experience, and with some 12 years' experience as a tool maker, was employed by respondent as a machinist in December 1942, at \$1.25 an hour (II. 186-190).

All three men proved to be eminently satisfactory workers, as is evidenced by the many wage increases and reclassifications which each of them received. Thus, Swope, who started at 50 cents an hour, as a result of periodic increases and reclassifications, was a "tool maker, Class C," at 95 cents per hour, at the time of his discharge (II. 299). Davis, who first performed assembly work, was transferred to the machine shop where, after four wage increases, he was receiving \$1.25 an hour as a "toolmaker, Class B," at the time of his discharge (II. 280). Gilpin, who started in as a machinist at \$1.25 per hour, was progressively classified as a Class B machinist, and later as a Class A machinist, at \$1.35 per hour, including a 5-cent bonus for night work (II. 189, 192).

The outstanding ability of these men is further seen in the comments of respondent's supervisory officials concerning their work. Edward Davey, works manager in charge of production at Plant 1, com-

mented on an occasion in December 1943, in which Davis asked for a wage increase or a certificate of availability, that Davis' work had been "very satisfactory," and that he had cited Davis to other employees as an example of the advancement that could be obtained through meritorious work (II. 272). Davey also remarked on this occasion: "Your friend Gilpin is the best man I have got in the tool-room * * * don't know what I would do without him" (*ibid.*). Earlier in 1943, Foreman Brian Johnson had observed, in the course of a conversation with Gilpin, Davis, and Swope, that Swope had broken a production record on a radial drill press operation (II. 311-313).¹⁴

The hearing before the Board upon the charges that respondent had unlawfully dominated, interfered with, and supported the Association was begun on December 13, 1943. Davis, one of the Board's principal witnesses, gave testimony adverse to respondent and, in particular, contrary to the testimony of Personnel Director Sullivan and Foreman Brian Johnson, witnesses for respondent (I. 181-189). Gilpin and Swope, close friends of Davis, attended the hearing and sat with Davis on occasion, thereby openly demonstrating their adherence to the Union and their opposition to the Association (II. 212-215, 261-264). Shortly after the hearing, the Union renewed its efforts to organize respondent's employees, and all three

¹⁴ Swope had in fact turned out 20 rear covers during his 10-hour shift, while 7 was the maximum other employees had produced in the same period (II. 312).

men signed union cards and wore union buttons while at work (II. 215-216, 285-286). Davis actively aided the union in its organizational efforts by passing out union authorization cards, and was named a union steward for his shift (II. 253-255, 284-286). For the last 10 days of his employment he regularly wore a large union steward's button while at work (II. 286).

The espousal of the Union's cause on the part of Swope, Davis, and Gilpin did not rest well with respondent, particularly Foreman Johnson, who frankly remarked to Employee Handzel, upon being questioned about the outcome of the hearing, that "those damn fools over in the tool room¹⁵ are just a bunch of troublemakers," and that "if they didn't care to belong to the Kinner Union * * * they didn't have to cause the trouble of bringing it up before the Labor Board" (II. 151-152). After the hearing, Ross Nichols, the foreman of the night shift in the tool room, on which all three men worked, openly displayed his resentment against Davis. While prior to the hearing, Nichols had been friendly to Davis, thereafter he ceased talking with Davis, except to the extent necessary to get the work out, and apparently went out of his way to find fault with Davis' work (II. 265-266). Davis encountered the same change in attitude on the part of Assistant Foreman Malamphey, Personnel Director Sullivan, and Works Manager Davey (II. 265-271).

Less than a month after the Trial Examiner in the prior proceeding issued his intermediate report on

¹⁵ At the time Swope, Gilpin, and Davis were the only employees in the tool room on the night shift (II. 150).

January 25, 1944, finding respondent guilty of unfair labor practices in connection with the Association, respondent abruptly terminated the employment of all three men. When Swope reported for work on February 17, 1944, he was advised by Foreman Nichols that there was no further work for him (II. 303-304). On his return to the plant several days later, Swope was given his pay check and a termination slip which stated: "Laid off—Termination of Contract" (II. 303-306, Bd. Exh. 12). On February 23, when Gilpin and Davis reported for work at their usual hour, they found that their work cards were missing and were advised by a plant guard that they were wanted at the personnel office (II. 249). Personnel Director Sullivan told them that Nichols had reported to him that there was no work for them (II. 250). On the following day, they returned for their checks and received their termination notices which stated: "lay off; lack of work. No available work for this employee" (II. 203-206, 257-260, 306-308). No warning was given to any of these men that they were to be laid off (II. 208, 246, 304).

Respondent contended before the Board, as we have briefly indicated, *supra*, p. 14, that Swope, Davis, and Gilpin were laid off for lack of work resulting from the cancellation of contracts for substantial quantities of war materials. In support of its contention respondent adduced evidence indicating that contracts covering \$1,500,000 worth of war materials to be produced at Plant 1 were cancelled on December 29, 1943, leaving a balance of \$400,000 in contracts for that plant (II. 28-29). However, respondent's

personnel records clearly show that no other employees were laid off for lack of work at Plant 1 during the period between the cancellation of the contracts on December 29, 1943, and April 20, 1944 (II. 108-112). Not only was there no general reduction in respondent's labor force at Plant 1 following the cancellation of the contracts,¹⁶ but during the period in question respondent's labor force at Plant 2, which is separated from Plant 1 only by a narrow alley, was steadily expanding (II. 108-112) and respondent was regularly seeking applicants for jobs which these employees were qualified to fill through advertisements inserted in various newspapers (II. 113-115, 120-121).

The machine and tool making operations at Plant 2 are of the same general character as at Plant 1 and the transfer of employees from one plant to the other is not uncommon (II. 85-87).¹⁷ During the period from January 1, 1944 to April 20, 1944, respondent hired a total of 125 new employees for production or tool department jobs in Plant 2 at a wage rate of 85 cents an hour or more (II. 96-102).¹⁸ At the same time these men were being dismissed, that is, from February 17 to 28, 1944, respondent hired 9 new em-

¹⁶ While the total number of production employees at Plant 1 fluctuated between 201 on December 31, 1943 and 185 on February 29, 1944, this temporary reduction was due to "quits" rather than lay-offs due to lack of work as respondent's records clearly show (II. 108, 110). The total number of production employees at Plant 1 was 199 on April 30, 1944 (II. 112).

¹⁷ Five of the total of 19 employees on the night-shift at Plant 1 as of August 1, 1943, were thereafter transferred to jobs in Plant 2 (II. 93).

¹⁸ In addition, respondent rehired 7 former employees after a leave of absence (II. 96-102).

ployees in the toolmaker, milling machine operator, radial drill operator, grinder, and engine lathe operator classifications at rates of pay ranging from \$.95 to \$1.25 per hour, which was approximately the range of pay of the three discharged men (II. 99). All three of the discharged employees were qualified and experienced in these operations (II. 185-196, 238-244, 299-302). In addition to these employees, who were taken on at Plant 2, 5 new employees were hired at Plant 1 within 2 months after the 3 men in question were terminated (II. 101-102). Notwithstanding the availability of work which Swope, Davis, and Gilpin were qualified to perform, respondent neither made any effort at the time of the discharges to utilize their skills¹⁹ in other operations (II. Tr. 537-538, 604-605) nor did it thereafter recall them as work subsequently opened up at Plant 1 on the operations they formerly had performed (II. 401-403).

From the foregoing it is clear that there is no substance to respondent's contention that Swope, Davis, and Gilpin were laid off for lack of work resulting from the cancellation of war contracts. The real reason for their discharge, we submit, is apparent. Davis was the mainstay of the Union in its efforts to organize respondent's employees and was one of the principal witnesses against respondent in the prior proceeding which resulted in a Board finding that respondent had

¹⁹ It is noteworthy that on January 1, 1944, after the cancellation of a substantial part of the Plant 1 contracts, respondent requested an occupational draft deferment for Davis, citing as a basis therefor that he was engaged in a highly skilled operation and that he could be replaced only out of industry (II. 117-120).

unlawfully interfered with and dominated the Association. Swope and Gilpin had shown themselves to be closely allied with Davis in union matters and because of their close association the three men had been dubbed "the three musketeers" by their fellow employees (II. 282). Respondent's opposition to outside labor organizations is clearly seen not only in its efforts to erect the Association as a bulwark against such organizations, but also in the contrasting treatment of the claims of the rival labor organizations concerning benefits secured for the employees (*supra*, pp. 8-9). And, as we have shown, *supra*, p. 17, Foreman Johnson bluntly expressed his disapproval of the actions of Davis, Swope, and Gilpin in pressing charges concerning the Association before the Board, and other supervisory officials of respondent openly displayed their resentment against Davis for having testified against respondent at the hearing in the first proceeding before the Board (*supra*, p. 17). Under all the circumstances it is submitted that the Board was clearly warranted in concluding that respondent, in violation of Section 8 (1) and (3) of the Act, discharged Swope, Davis, and Gilpin because of their union affiliation and activities, and for the further reason, in the case of Davis, because he testified against respondent at the prior Board hearing, thereby violating Section 8 (4) of the Act. See *N. L. R. B. v. Walt Disney Productions*, 146 F. (2d) 44, 47 (C. C. A. 9), cert. denied April 23, 1945; *N. L. R. B. v. American Pearl Button Co.*, No. 12972 (C. C. A. 8), decided May 8, 1945, 16 L. R. R. 403, 404-405.

POINT II

The Board's orders are valid and proper

The Board's orders direct respondent to cease and desist from dominating, interfering with, or contributing support to the Association, from giving effect to its contract with that organization (Case No. 21-C-2307, I. 19), and from discharging or otherwise discriminating against any of its employees because of his union membership or activities, or because he has given testimony under the Act (Case No. 21-C-2389, II. 16-17). In both cases respondent is ordered to cease and desist from in any other manner interfering with its employees in the exercise of their rights under the Act (I. 19, II. 17). The Board's orders affirmatively require respondent to withdraw recognition from and completely disestablish the Association as the collective bargaining representative of any of its employees (Case No. 21-C-2307, I. 20), and to reinstate Swope, Davis, and Gilpin with back pay (Case No. 21-C-2389, II. 17-18). The orders in both cases contain the usual posting of notices and furnishing of compliance report provisions (I. 20, II. 18).

A. The cease and desist provisions

The provisions of the orders requiring respondent to cease and desist from the unfair labor practices in which it is found to have engaged are mandatory under Section 10 (c) of the Act. *N. L. R. B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 265.

The provisions directing respondent to cease and desist from in any other manner interfering with its

employees in the exercise of their rights under the Act are, it is submitted, fully within the broad discretion vested in the Board to determine how unfair labor practices are to be remedied. As the Supreme Court observed in *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, at 194: "But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review." See also *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 82, *N. L. R. B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 266; *N. L. R. B. v. Sunshine Mining Co.*, 125 F. (2d) 757, 761 (C. C. A. 9); *N. L. R. B. v. National Motor Bearing Co.*, 105 F. (2d) 652, 660-661 (C. C. A. 9).²⁰ Respondent, as we have seen (*supra*, p. 5), countered the first organizational efforts of its employees with the formation of a rival unaffiliated organization and thereafter aided it greatly in maintaining and increasing its membership.

²⁰ A broad cease and desist provision identical with the provisions here under discussion was enforced by the Circuit Court of Appeals for the Eighth Circuit in *N. L. R. B. v. May Department Stores Co.*, 146 F. 2d 66. The Supreme Court on April 9, 1945, granted the employer's petition for certiorari, which challenged, among other things, the broad cease and desist provision there involved (65 S. Ct. 1014), and consequently the question of the validity of this type of order is now before the Supreme Court.

Shortly after respondent's relations with the Association were found by a Trial Examiner of the Board to be violative of the Act, respondent abruptly discharged one of the principal witnesses against respondent at the hearing before the Board and two of his associates in the Union (*supra*, p. 14). Respondent's conduct in this regard, as the Board found (I. 18, 34, II. 35, 46), violated not only Section 8 (2), (3), and (4) of the Act, but Section 8 (1) of the Act as well. As the Circuit Court of Appeals for the Second Circuit has held, discharges because of union activity are "probably the primary wrong against which Section 8 (1) * * * was directed" (*N. L. R. B. v. Remington Rand, Inc.*, 94 F. (2d) 862, 869, cert. denied 304 U. S. 576).²¹ Having engaged in unfair labor practices within the meaning of Section 8 (1) of the Act, the issuance of an order requiring respondent to cease and desist from such unfair labor practices is also mandatory under Section 10 (c) of the Act.

The scope of the provisions requiring respondent to cease and desist from its unfair labor practices in violation of Section 8 (1), i. e., the inclusion therein

²¹ See also the following cases in which this and other courts have held that violations of other subdivisions of Section 8 also constitute violations of Section 8 (1): *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 432-433; *N. L. R. B. v. Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 22-23 (C. C. A. 9); *Art Metals Construction Co. v. N. L. R. B.*, 110 F. (2d) 148, 150-151 (C. C. A. 2); *N. L. R. B. v. Waumbeec Mills*, 114 F. (2d) 226, 234 (C. C. A. 1); *N. L. R. B. v. Newark Morning Ledger Co.*, 120 F. (2d) 262, 265 (C. C. A. 3).

of the *in any other manner* clause, is warranted, it is submitted, under all the circumstances of this case. Respondent has sought to interfere with the self-organizational activities of its employees in diverse ways, and it is reasonable to anticipate that it will seek to combat future organizational efforts by other means. The broad cease and desist provision is therefore necessary to protect the employees from further invasions of their rights under the Act. This Court has recognized that "the methods by which a given unfair labor practice may be committed are so varied and numerous that the protection granted to employees by the Act would be largely ineffectual if each variation on the same theme necessitated a separate hearing and a specific prohibitory order," and that it is for this reason that the Act confers upon the Board the broad power to enjoin the unfair labor practice found and not merely the specific acts which constitute the unfair labor practice. *N. L. R. B. v. National Motor Bearing Co.*, 105 F. (2d) 652, 661 (C. C. A. 9).

The propriety of the broad cease and desist provision is indicated by the Supreme Court decision in *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426. In this case the Supreme Court affirmed the Board's power to restrain not merely the specific unlawful practice in which the employer has engaged, but also "other like or related unlawful acts" (312 U. S., at 436). The opinion points out that "the breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is

indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past" (312 U. S., at 436-437). Further clarifying its position, the Supreme Court pointed to various cases in which it had enforced broad cease and desist orders because "in them the unfair labor practices did not appear to be isolated acts in violation of the right of self-organization, like the refusal to bargain here, but the record disclosed *persistent attempts by varying methods* to interfere with the right of self-organization in circumstances from which the Board or the Court found or could have found the threat of continuing and varying efforts to attain the same end in the future" (312 U. S., at 437-438). [Italics supplied.] The broad noninterference provisions in these cases are clearly proper under the rule laid down in the *Express Publishing* case. Respondent, as we have shown, has engaged in "persistent attempts by varying methods to interfere with the right of self-organization," and it is reasonable to infer therefrom that there is a danger of respondent's committing other unfair labor practices in the future, which although similar and related to the unfair labor practices committed in the past, would not come within the ban of the other cease and desist provisions of the order. The broad non-interference provisions are therefore necessary to make the Board's orders in these cases coextensive with the threat of future unfair labor practices reasonably to be anticipated from respondent's past unlawful conduct.

We are not unmindful of the decisions of this Court *N. L. R. B. v. Walt Disney Productions*, 146 F. (2d) 44; *N. L. R. B. v. Cowell Portland Cement Co.*, 148 F. (2d) 237; *N. L. R. B. v. Cheney California Lumber Co.*, decided March 31, 1945; and *N. L. R. B. v. Gilfillan Bros., Inc.*, decided April 21, 1945, in which the Court struck the broad cease and desist provisions from the Board's orders upon the grounds that the specific cease and desist provisions were sufficiently broad to cover future unfair labor practices,²² but, for the reasons hereinabove set forth, we respectfully submit that those decisions not only fail to give proper scope to the Board's discretion to determine remedy but also ignore the principle laid down in the *Express Publishing* case that the Board is entitled to enjoin like and related acts, as well as the specific unfair labor practice in which the employer has engaged and hence should not be followed here.

B. The affirmative provisions

The affirmative provisions of the Board's orders requiring respondent to disestablish the Association and to reinstate Swope, Davis, and Gilpin with back pay are the usual remedial orders entered upon findings of violations of Section 8 (2), (3), and (4) of the Act and their validity is not to open to question. *N. L. R. B. v. Falk Corp.*, 308 U. S. 453, 459-461; *N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 249-251; *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 187-189, 197.

²² Compare *N. L. R. B. v. Holtville Ice Co.*, 148 F. (2d) 168, and *N. L. R. B. v. Whiting-Mead Co.*, 148 F. (2d) 817, in which this court enforced broad cease and desist provisions despite the employers' objections.

The Board properly rejected respondent's contention that the Board should withhold the normal remedy of reinstatement and back pay in the cases of Swope, Davis, and Gilpin because of derogatory statements concerning the purchase of war bonds made by these men. In support of its contention respondent adduced evidence to the effect that subsequent to the dismissal of these men respondent learned that they had previously commented adversely upon the purchase of war bonds in the course of conversations with their fellow workmen.²³ The men themselves denied having made the statements attributed to them but admitted having made certain comments which were clearly unfavorable to the purchase of war bonds.²⁴ The

²³ The statements these men are alleged to have made are set forth in detail in the Intermediate Report (II. 36-38, n. 12).

²⁴ The testimony of these men concerning the statements in question, as summed up in the Intermediate Report which was adopted by the Board, is as follows (references to the record are inserted in brackets) :

"Gilpin admitted that he had stated that it was not patriotic to buy war bonds at a profit. 'I would say that here or anywhere,' he testified, 'that I thought anybody that would buy war bonds for a profit while the boys are dying in France, wasn't very patriotic. I say give the money; they were giving their lives.' [II. 217.] He denied, however, that he stated that the bonds would be worthless. [II. 225.] Davis admitted that he told Dayhoff on one occasion that he did not believe in 'tying up all the money that a man had in War Bonds, because they might be frozen at any time and he wouldn't have the opportunity to get necessary money in case of sickness or so forth.' [II. 292.] He did not recall having said at any time that the bonds would be worthless. [*Ibid.*] 'I said,' he testified, 'that it was possible that the Government debt would get so big they couldn't pay off. I didn't say they would. I said it was possible.' He also admitted that he told Dayhoff that he did not know that the bonds would be good 'since the war bonds in the first war were not redeemed at full price and this was

Board found, upon the basis of the entire testimony, that Swope, Davis, and Gilpin had each made statements to fellow employees which would be understood by them as adverse to the purchase of war bonds but, however, concluded (II. 15), in view of the considerations discussed below, that the reinstatement of these men with back pay "would not adversely affect plant morale or production, and that effectuation of the purposes and policies of the Act requires their reinstatement with back pay."

The statements in question were made, as the Board noted (II. 40-41), in the course of casual discussions and arguments among the employees, and not as a part of a concerted effort on the part of Swope, Davis, and Gilpin to discourage the purchase of war bonds (II. 402). There is no evidence that their talk provided an actual impediment to the sale of war bonds or created disorder or commotion in the plant, or in any way interfered with respondent's production or discipline. Although Employee Holmes reported to Foreman Brian Johnson in the fall of 1943 that Davis and Gilpin had commented adversely on the purchase of war bonds, Johnson did not consider the matter serious enough to bring to the attention of the management (II. Tr. 760-761). Too, it is

a much bigger debt at this time than it was before.' [II. 292-293, 407.] Swope testified that after reading a newspaper article in January 1944, on the amount of money spent by the U. S. Treasury in advertising the sale of war bonds, he remarked to Dayhoff that it might be more practical to spend the money on the purchase of war materials instead of advertising. [II. 314-315.] He did not recall ever having stated that the bonds would be worthless." [II. 316.]

noteworthy that throughout the period the statements were being made Swope, Davis, and Gilpin were actively cooperating in the purchase of war bonds through pay-roll deductions (II. 218, 316-317, 406-407).

Under all the circumstances of the case, it is submitted that the Board did not abuse its discretion in determining (II. 40-41) that "while * * * certain of the statements were ill-advised and improper, they did not represent a wilful and malicious obstruction of the war effort, and are not distinguishable in principle from such criticism of certain phases of the war effort as is heard in and out of industry, and which is privileged under our constitutional guarantee of free speech"²⁵ and hence did not warrant the Board in withholding the normal remedy of reinstatement with back pay in the case of Swope, Davis, and Gilpin.²⁶

²⁵ During the last war all of the Government bonds sold were of the negotiable type which could be converted into cash in advance of the maturity dates only by selling them on the open market. The market price of these bonds during substantial periods after the last war was considerably below their face value and consequently holders of the bonds who were forced to sell during such periods suffered substantial losses. In view of these losses it is not beyond comprehension that persons unfamiliar with the cash redemption provisions of the nonnegotiable bonds sold to the public during this war might express doubts as to the liquidity of investments in war bonds.

²⁶ It is to be noted that the Board in its decision pointed out (II. 15) that nothing therein contained "should be construed to preclude the respondent from resorting to nondiscriminatory disciplinary action appropriate to bar the resumption of such practice in the event that the three employees, or any of them, make any such derogatory statement with respect to United States war bonds in the future."

CONCLUSION

It is respectfully submitted that the Board's findings in both cases are supported by substantial evidence, that its orders are valid and proper, and that decrees should issue enforcing the Board's orders in full, as prayed in the Board's petitions for enforcement.

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JUNE 1945.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sect. 151, *et seq.*) are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or as-

sisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire

record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

The relevant portion of the 1944 Appropriation Act (Act of July 12, 1943, 57 Stat. 494, 515) is as follows:

* * * No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed: *Provided*, That hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person.

The relevant portion of the 1945 Appropriation Act (Act of June 28, 1944, 58 Stat. 547, 568) is as follows:

No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement, or

a renewal thereof, between management and labor which has been in existence for three months or longer without complaint being filed by an employee or employees of such plant: *Provided*, That, hereafter, notice of such agreement or a renewal thereof shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person: *Provided further*, That these limitations shall not apply to agreements with labor organizations formed in violation of section 158, paragraph 2, title 29, United States Code.

Nos. 10956 and 10984

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

KINNER MOTORS, INC.,

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NATIONAL LABOR RELATIONS BOARD,

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vs.

KINNER MOTORS, INC.,

Respondent.

ON PETITIONS FOR ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENT.

FILED

JUL 23 1945

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BRIEF OF RESPONDENT.

Although these two cases are combined and involve the same parties they are separate and distinct, and we desire to submit this brief in two parts.

Case No. 10956.

Since the order of the National Labor Relations Board was made in this case the respondent has stipulated to an election for a Bargaining Representative. That said election was held and the International Association of Machinists A. F. of L. won the election and now are the ap-

proved Bargaining Representative of the employees of the respondent. Therefore, most of the order has become moot and therefore the respondent consents that an order be made enforcing the order of the National Labor Relations Board with the exception of those portions of the order which read as follows:

“1. Cease and desist from:

“(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, Lodge No. 311, affiliated with the American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.” [Tr. p. 19.]

There is not one word of evidence that the respondent ever did a single act which interfered with the joining of its employees with the International Association of Machinists Local No. 311 or any other union and therefore there is no basis for such a restraining order. By reason of the fact that the Machinists Union is now the Bargaining Representative conclusively shows that no such interference was ever had.

The cases of *N. L. R. B. v. Walt Disney Productions*, 146 Fed. (2d) 44; *N. L. R. B. v. Cowell Portland Cement Co.*, 148 Fed. (2d) 237; *N. L. R. B. v. Newark Morning L. Co.*, 120 Fed. (2d) 263, and *N. L. R. B. v. Lipshutz*, 149 Fed. (2d) 141, are directly in point and prohibit the Board from making such a broad order.

Neither does the case of *N. L. R. B. v. Express Publishing Company*, 312 U. S. 426, authorize such a blanket order.

The above cited cases follow and interpret the *Express Publishing Company* case.

As was stated in the *Express Publishing* case:

“The mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.”

Case No. 10984.

In this case the N. L. R. B. order provided for the reinstatement of employees Davis, Gilpin and Swope. We believe there is no substantial evidence that these men were discharged for union activities but on the contrary the evidence is positive they were laid off by reason of the cancellation of contracts and the closing of the night shift in the tool room in which they were employed.

The testimony in that regard is as follows:

“I remember the incident of the layoff of Mr. Swope. When I got to the termination of the work where I wasn't able to supply further work for him I had to make out a release and lay him off. [338] I talked to Mr. Davey about the matter. I simply pointed out to him that the work was getting so slack that I didn't know what to do with the night men and particularly Mr. Swope at that time. The job that he was on should have been finished the night before

and it was only half finished so I had to lay him off that same day. I did not have enough work for him to go through the entire night. If I had kept him on it would have been an economic loss for the balance of the time. [339] I reported this situation in connection with the lack of work on the day I laid Mr. Swope off. I talked to Mr. Swope at the time. [340] I said that the work was getting so slack I would have to lay him off. I never noticed Mr. Swope wearing any A. F. of L. badges or union buttons. In regard to the layoff of Mr. Gilpin and Mr. Davis, I talked to Mr. Davey. I told him the work was so slack I didn't know what to do with the men. He said 'use your own judgment, you will have to do what you consider best'. Since February 23rd there has never been operated any night shift in the tool room at Plant #1. [341] In my opinion it has not been necessary to operate a night shift in the tool room in Plant #1. [342] I have been with Kinner Motors since 1929. I have been in charge of the Tool Room since 1936. In my opinion since February 23rd it has not been necessary to operate the night shift in the tool room in Plant #1. I talked with Gilpin and Davis on the night they were laid off. I told them it was on account of the lack of work. [343] Prior to the time that Swope, Davis and Gilpin were laid off the work in the night shift in Plant #1 was gradually decreasing right along. At one time we had probably thirty-five or forty or fifty men working there. [344] I decided myself to lay off Davis, Gilpin and Swope. I decided the day that I laid them off. It was because I had no work for them to do. I discussed the matter with Mr. Davey. [345] I told Mr. Davey the time was drawing to such a close on work I didn't now what to do with the men in order to keep them in work. I was giving them little insubordinate jobs that didn't amount to

anything. It just simply run out. I didn't know what to do with them. He told me the only thing I could do was to lay them off. I did not mention Gilpin or Davis by name. [346] I made out a slip for Swope when I laid him off. I instructed the stenographer to write on the slip 'lack of work' which was the reason I was laying Swope off. I made out the slips for Gilpin and Davis. [347] I told the stenographer to make out the releases and she wanted to know what foundation and I told her lack of work."

Edward Davey testified in substance as follows:

"I remember a conversation with Mr. Nichols in relation to the tool room at Plant #1. [349] Mr. Nichols stated he was running out of work which had been evident for some time other places. I told Mr. Nichols that that was his job. [350] I had another conversation with Mr. Nichols. He said that he had reached the end of his work; that he couldn't find any more work. He said 'what about it'. I said 'that is up to you. That is your job to keep that tool room in shape and get the necessary tools out and all that.' Prior to February 16th, I never saw Gilpin, Davis or Swope wear any union buttons." [353]

The foregoing testimony is undisputed and clearly shows that all work in the tool room in Plant #1 had ceased and it is further substantiated by the fact as found in the Findings of Fact in the Intermediate Report, page 28 of the transcript, which reads as follows:

"As previously noted, it is respondent's position that Swope, Davis & Gilpin were temporarily laid off because of lack of work. It appears that on December 29, 1943 contracts in an amount of \$1,-500,000.00 involving production at Plant #1 were

cancelled leaving a balance of \$400,000.00 in contracts for that plant. That no new contracts for that plant were obtained until subsequent to February 23rd, 1944. It further appears that no tool makers have been employed in the tool room at Plant #1 on a night shift since the named employees were discharged or laid off."

We therefore have the uncontradicted testimony that the work was practically ceasing in the tool room in Plant #1 caused mainly by the cancellation of \$1,500,000.00 of contracts. We therefore feel that no other conclusion can be drawn but that these men were laid off not for any union activities but because of lack of work on the job in which they were employed.

The only evidence that they were discharged for union activities is by reason of the fact that Davis testified in Case No. 10956 adverse to the respondent and that Swope and Gilpin sat with him during the hearing.

Even if such a strained inference can be drawn from the evidence by the Board which we believe to be inconceivable nevertheless the refusal to reinstate them was proper when the respondent later learned of the very unpatriotic statements made by them in regard to the purchase of war bonds.

The evidence is uncontradicted and overwhelming that these three men made the most unpatriotic, reprehensible, dissention provoking and morale destroying statements among themselves and to other employees of respondent in regard to the purchase of war bonds.

Let us briefly summarize the evidence in this regard.

(All numbers refer to the pages of the transcript of the record in case No. 10984.)

Leslie M. Dayhoff, who incidentally was a witness for the Board, testified in substance as follows:

"I told Mr. Brian Johnson that these three men were trying to discourage the war bond sale. I told him that the three men had stated that people were spending their money foolishly, and the War Bonds would not materialize, nobody would ever get their money back from them. [141-142] I heard Swope say that people were foolish to buy them. I also heard Davis say that you wouldn't get your money back. I also heard Swope say that, and he also said it was foolish for anyone to buy them."

Glenn Henry Gilmore testified in substance as follows:

"I had conversations with Mr. Gilpin and Mr. Davis but not with Mr. Swope in regard to war bonds. This was in the presence of Mr. Malamphey and the rest of the boys in the tool room. I heard Mr. Gilpin say that the war bonds were no God damn good. [Page 355] Jim Davis also told me that as far as he was concerned they are no damn good and how did I know that they are going to cash them in when they mature. The country might not be any good. I told him the country is plenty good and that I liked it here and if he didn't like it why in the hell didn't he get out. Mr. Gilpin offered to sell me a bond for \$10.00. [356] I got accused of being tough with him. He said the bonds were no good. I heard him say several times that he didn't think the bonds were worth a damn." [357]

Vera H. Allen testified in substance as follows:

"I had a conversation with James Davis. He stopped by my machine where I was completing a bond for somebody else and he made the statement that the bonds would not be worth a nickle after the war. I heard him make similar statements to other people." [358]

Clifton Edmond Malamphey, Jr., testified in substance as follows:

"We get our bonds in envelopes. We all had our bonds and these two fellows, Mr. Davis and Mr. Gilpin had theirs, too. They said they were no good. They would be no good after the war. And they said they were also selling them as soon as possible. Mr. Davis said he was selling them as soon as possible, and Mr. Gilpin said he would sell them to anyone for \$10.00." [360]

John A. Szabo testified in substance as follows:

"I had a conversation with Mr. Davis, Mr. Gilpin and Johnson and Koler and Les Dayhoff. Gilpin said that the Red Cross was making money on the blood. They were selling it. [361] I had a conversation with Mr. Gilpin and Mr. Davis, and I think Mr. Gerth was up there, and that was up in the Men's Room. Gilpin said that he saw they were selling the War Bonds again. I said, yes. I said, I got about \$1500.00 worth. He said, 'well they won't be worth a nickle after the war. They won't be no account.' [362] One night Swope said, 'I wouldn't give you a nickle for any War Bond.' [363] One night I talked to Garrett and I asked what he thought of those fellows making those remarks about War Bonds in the Men's Room, and I told him that if they said that up at the Victory House that they would probably mob them." [364]

Frank Peter Holmes testified in substance as follows:

"I had a conversation with Mr. Davis and Mr. Gilpin about War Bonds. I told them I got a \$50.00 bond a month and they said they would not be worth \$5.00 a piece after the war. Both of them said that."

John Hardy Shelley testified in substance as follows:

"I have had several conversations with Mr. Davis, Gilpin and Swope about War Bonds. I told them I had gotten a \$50.00 bond and Gilpin told me that I could paper the house with it."

Not only is all of the foregoing testimony not denied or controverted in any way but the three men, Davis, Gilpin and Swope practically admitted making these statements. Their testimony is as follows:

James Davis testified:

"I heard a conversation between Mr. Gilpin and Mr. Shaw. Mr. Shaw asked Mr. Gilpin if he would sign up to buy more bonds. Mr. Gilpin said no, that he didn't believe in buying bonds for a profit while the boys were shedding blood in Europe. He didn't believe in buying for a profit. He believed in giving them the money. [234] I remember one conversation I had with Mr. Dayhoff when I said I didn't believe in tying up all the money that a man had in War Bonds because they might be frozen at any time and he wouldn't have the opportunity to get necessary money in case of sickness, etc. [292] I told Mr. Dayhoff that it was possible that the Government debt would get so big they couldn't pay it off." [293]

Richard Swope testified as follows:

"I talked to Mr. Dayhoff about bonds. I asked him how long he thought it would take us to make up

the amount of money referred to in the newspaper, about the three and a half million dollars being allowed to the Treasury Department for advertising on war bonds. I asked him how long he thought it would take us at Kinner's to make that amount up, that was spent not in furthering the war effort in the way of buying materials but for advertising. That they should forget about the three and a half million dollars for advertising." [315]

Lewis Gilpin testified as follows:

"I discussed War Bonds with anybody that said anything to me about them. I told them that I thought people ought to give their money when the boys were giving their lives and shouldn't monkey with War Bonds. [220] I told Mr. Dayhoff that I didn't think buying War Bonds for a profit for the lives of the American soldiers over there that were dying, I didn't think that was right. [230] I made these statements to practically everybody I talked to—not only to employees—to anybody, and I am saying it to you."

It is beyond belief that the Board could hold that these very unpatriotic statements of these employees could not affect their right to reinstatement and rehiring by Kinner Motors, Inc. This is a war plant and all of the respondent's employees are doing their utmost to further the war effort and when they are compelled to associate with their fellow employees who make such unpatriotic statements and do everything possible within their power to discourage the sale of War Bonds no other conclusion can be reached but that such statements did create dissention, in-harmony and interruption of and interference with production and discipline in the plant of the respondent. Further, the finding of the Board that this evidence, that their

talk concerning War Bonds did not provide an actual impediment to the sale of War Bonds or create dissention is inconceivable. We therefore respectfully urge that such unpatriotic conduct and statements on the part of these three employees justified the respondent in failing to reinstate them when this action was called to the attention of the respondent.

We further respectfully urge that that portion of the order in paragraph (1), subdivision (a) and paragraph (1) subdivision (c) [pages 16 and 17 of the transcript] which reads as follows:

“1. Cease and desist from:

“(a) Discouraging membership in International Association of Machinists, affiliated with the American Federation of Labor, or in any other labor organization of its employees, by discriminating in regard to the hire or tenure of employment of any of its employees, or any term or condition of employment;
* * *

“(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, affiliated with the American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act,”

be eliminated. This is a blanket order and there is no evidence in this case that the respondent ever did anything to interfere with the American Federation of Labor or

any other labor organization, and for the same reasons set forth in this brief to the similar provisions of the order in Case No. 10956 and the same authorities therein cited to which reference is hereby made.

Conclusion.

Respondent, Kinner Motors Inc., therefore, respectfully urges that in Case No. 10956, that the Order be modified to eliminate therefrom Section One, Subdivision C, as contained on page 19 of the Transcript, and in Case No. 10984 that enforcement be denied and that it be found that the employees Davis, Swope, and Gilpin were not discharged for Union activities, but by reason of lack of work on the jobs in which they were employed, and that it further be determined that the respondent was justified in not rehiring them by reason of their unpatriotic and dissension-provoking statements, concerning war bonds, and without receding in any way from the foregoing propositions, that, in any event, Paragraph One, Subdivision A and Paragraph One, Subdivision C of the Order, as contained on pages 16 and 17 of the Transcript be eliminated.

VICTOR FORD COLLINS,

Attorney for Respondent, Kinner Motors Inc.

Nos. 10956 and 10984

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

**PETITION OF THE NATIONAL LABOR RELATIONS BOARD
FOR REHEARING**

FILED

NOV 12 1940

PAUL F. JOHNSON,
CLERK

In the United States Circuit Court of Appeals for the Ninth Circuit

Nos. 10956 and 10984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

*To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

Comes now the National Labor Relations Board, petitioner herein, and respectfully petitions this Court for a rehearing in the above-entitled causes. In support of this petition, the Board respectfully shows as follows:

1. On July 22, 1944, the Board issued its decision in No. 10956, in which it found that respondent had dominated, interfered with, and supported a labor organization among its employees in violation of Sec-

tion 8 (1) and (2) of the Act (R. I, 34, 36). On December 13, 1944, the Board issued a second decision, in No. 10984, in which it found that respondent had discharged two employees because of their union membership and activities, in violation of Section 8 (1) and (3) of the Act, and that it had discharged a third employee both because of his union membership and because he had testified against respondent in the first case, in violation of Section 8 (1), (3), and (4) of the Act (R. II, 35, 46). In each case, the Board ordered respondent to cease and desist from unfair labor practices of the specific type found. Since it found that respondent's violations of Section 8 (2), (3), and (4), constituted violations of Section 8 (1), it directed respondent, in paragraph 1 (c) of the order in each case, to cease and desist from "in any other manner" interfering with the rights of its employees guaranteed in Section 7 of the Act (R. I, 19; II, 17).

On petition by the Board for enforcement of its order in each case, this Court issued its decision on December 29, 1945 which, as later amended, required elimination of paragraph 1 (c) from both orders. In directing this modification, the Court relied on certain quoted language of the Supreme Court in *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426. In addition, the Court stated that "in *May Department Stores Co. v. N. L. R. B.*, — U. S. — (1945), it [the Supreme Court] held that an omnibus cease and desist order will not be approved unless there is a 'clear determination by the Board of an attitude of opposition to the purposes of the Act to protect the rights of employees generally.' "

2. For reasons more fully stated in our petition for rehearing in *N. L. R. B. v. Van De Kamp's Holland Dutch Bakers, Inc.*, No. 10949, filed together with this petition and made a part hereof, we submit (a) that the Court's action in striking paragraph 1 (c) entirely is in direct conflict with the square holding of the Supreme Court in the *Express* and *May* cases; and (b) that enforcement of the Board's order without modification is warranted in this case under the rules laid down in those two cases.

Specifically, respondent's violations of Section 8 (2) (3), and (4) of the Act fully meet the test laid down in the *Express* case, since they constitute "persistent attempts by varying methods to interfere with the right of self-organization," 312 U. S., at page 438. Indeed, there could hardly be a clearer demonstration of respondent's wanton disregard of the law than its discharge of an employee because he gave testimony before the Board (R. II, 35).

3. If the Board's orders are modified as directed in the Court's opinion, the decree of this Court will not be available to the Board even if respondent threatens to commit the very illegal acts it is now enjoined from committing. Thus it could threaten to discharge any employee who engaged in union activity; it could effectively prevent the giving of testimony by employees at Board hearings by threatening to discharge them if they did so. No clearer form of coercion can be imagined. We cannot conceive it to be the intention of this Court thus to withhold the summary procedure provided by statute for restraint of such conduct and to force the Board, if respondent persists in

its illegal efforts, again to resort to the lengthy procedure of filing of charge, issuance of complaint, hearing before a Trial Examiner, Intermediate Report, Decision and Order, Petition for Enforcement, and ultimate decree, all of which Congress sought to make unnecessary in respect to employers whose prior illegal conduct in that respect has resulted in a court-enforced Board order.

Wherefore, it is prayed that a rehearing in these cases be granted, and that on such rehearing the orders of the Board be enforced in full. In the alternative, it is prayed that this Court withhold action on this petition for rehearing until the Supreme Court issues its decision in *N. L. R. B. v. Cheney California Lumber Co.*, 149 F. 2d 333 (C. C. A. 9), certiorari granted, — S. Ct. —, October 1945 Term, No. 319.

Respectfully submitted.

A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations Board.

JANUARY 1946.

CERTIFICATE OF COUNSEL

Comes now A. Norman Somers, Assistant General Counsel for the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition and that said petition is filed in good faith, and not for the purposes of delay.

A. Norman Somers,
 A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations Board.

JANUARY 1946.

Nos. 10956 and 10984

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

*ON PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL
LABOR RELATIONS BOARD*

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR
LEAVE TO FILE SUPPLEMENT TO PETITION FOR REHEARING
AND SUPPLEMENT TO PETITION FOR REHEARING**

FILED

SEP 2 1956
U.S. CIR. CT. 9TH CIR.
SAN FRANCISCO, CALIF.

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

Nos. 10956 AND 10984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

*ON PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL
LABOR RELATIONS BOARD*

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR
LEAVE TO FILE SUPPLEMENT TO THE PETITION FOR RE-
HEARING**

Comes now the National Labor Relations Board, by its Assistant General Counsel, and respectfully asks leave to file the annexed Supplement to the Board's petition for rehearing previously filed herein.

A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations Board,
Washington, D. C.

Dated MARCH 1946.

(1)

In the United States Circuit Court of Appeals for the Ninth Circuit

Nos. 10956 and 10984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

**ON PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL
LABOR RELATIONS BOARD**

**SUPPLEMENT TO PETITION OF THE NATIONAL LABOR
RELATIONS BOARD FOR REHEARING**

*To the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

Supplementing the Petition for Rehearing previously filed by the National Labor Relations Board in the instant case, the Board respectfully shows the Court as follows:

4. On December 29, 1945, this Court issued its decision in these proceedings in which, as later amended, it directed enforcement of two orders issued by the Board against respondent, as modified, by deletion of Paragraph 1 (c) from each order, the so-called "broad cease and desist" provisions. Thereafter the Board filed a petition for rehearing urging enforcement of its orders in full and suggesting in

the alternative that this Court withhold action on the petition until the Supreme Court issued its decision in *N. L. R. B. v. Cheney California Lumber Co.*, 149 F. 2d 333 (C. C. A. 9), in which the Supreme Court had then granted the Board's petition for writ of certiorari (66 S. Ct. 97). The Supreme Court decided the *Cheney* case on February 25, 1946.

We are filing with this Supplement a Supplement to the Board's Petition for Rehearing in No. 10949, *N. L. R. B. v. Van de Kamp's Holland Dutch Bakers, Inc.* In that Supplement, to which we respectfully refer the Court, we described the Supreme Court's decision and its application to the facts in that case. For the reasons therein stated we believe that the decision is equally applicable here and requires enforcement in full of the Board's orders.

5. With respect to the application of Sec. 10 (e) of the Act, it is equally true here that respondent failed to raise the question of the propriety of the broad cease and desist order in either of these cases. In No. 10984, the Trial Examiner recommended the broad cease and desist provision in his Intermediate Report (R. 47). Although excepting to the affirmative provisions recommended by the Trial Examiner (R. 58), respondent took no exception to the recommended cease and desist provision. In No. 10956, the Trial Examiner's Intermediate Report similarly recommended a broad cease and desist provision (R. 37). Yet respondent's only reference to the recommended order was in its Exception 62 which stated merely that "the evidence and findings of fact and conclusions

of law are insufficient to justify the recommendations” generally (R. 61). In no brief filed with the Board in support of its exceptions and nowhere else in the record did respondent in any way raise any question as to the scope of the Board’s order.

Respectfully submitted.

A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations Board,
Washington, D. C.

Dated MARCH 1946.

CERTIFICATE OF COUNSEL

Comes now A. Norman Somers, Assistant General Counsel for the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing Supplement and that said Supplement is filed in good faith, and not for purposes of delay.

A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations Board.

MARCH 1946.

No. 10992

United States

Circuit Court of Appeals

For the Ninth Circuit.

CONTRACTORS, PACIFIC NAVAL AIR
BASES, an Association, and LIBERTY
MUTUAL INSURANCE COMPANY, a Cor-
poration,

Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of
the United States Employees Compensation
Commission for the 14th Compensation Dis-
trict, and TEX HADDON,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

MAY 1 - 1945

PAUL P. O'BRIEN,
CLERK

No. 10992

United States
Circuit Court of Appeals
For the Ninth Circuit.

CONTRACTORS, PACIFIC NAVAL AIR
BASES, an Association, and LIBERTY
MUTUAL INSURANCE COMPANY, a Cor-
poration,

Appellants,

VS.

WM. A. MARSHALL, Deputy Commissioner of
the United States Employees Compensation
Commission for the 14th Compensation Dis-
trict, and TEX HADDON,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellees:

KOENIGSBERG & SANFORD

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Seattle, Washington.

Attorneys for Tex Haddon

J. CHARLES DENNIS

United States District Attorney
1017 United States Court House
Seattle, Washington.

HERBERT O'HARE

Assistant United States Attorney
1017 United States Court House
Seattle, Washington. [1*]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 962

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation, and CONTRACTORS, PA-
CIFIC NAVAL AIR BASES, an Association,
Libellants,

v.

WM. A. MARSHALL, Deputy Commissioner of
United States Employees' Compensation Com-
mission for the Fourteenth Compensation Dis-
trict,

Respondent.

BILL OF COMPLAINT FOR MANDATORY INJUNCTION

Come Now the libellants above named and for
bill of complaint against the respondent alleges:

I.

That the libellant, Liberty Mutual Insurance Company, is now and was at all times herein mentioned, a mutual insurance corporation organized and existing by virtue of the laws of the state of Massachusetts, and authorized by the United States Employees' Compensation Commission to provide compensation insurance protecting the employees under the Longshoremen's and Harbor Workers' Compensation Act as extended by the Act of August 16, 1941, as amended, (42 U.S.C.A. Sec. 1651) hereinafter referred to as "The Act," and the Insurance

Carrier provided by libellant, Contractors, Pacific Naval Air Bases, an association, in accordance with the provisions of the act.

II.

That the libellant, Contractors, Pacific Naval Air Bases, is now and was at all times mentioned herein, an association of contracting firms engaged in building and erecting military and naval installations for the United States, particularly in the islands of the Pacific Ocean. [2]

III.

That the respondent, Wm. A. Marshall, is now and was at all times mentioned herein, Deputy Commissioner of the Fourteenth Compensation District under the provisions of the Act, and his office is located at Seattle within the judicial district of the above entitled court.

IV.

That on or about January 22, 1942, the libellant, Contractors, Pacific Naval Air Bases, employed one Tex M. Haddon as a civilian employee to work at a base on the Hawaiian Islands occupied or used by the United States for military or naval purposes and that said Tex M. Haddon, continued in such employment, and as such employee of said libellant until on or about December 24, 1942.

V.

That on or about September 3, 1943, the said Tex M. Haddon filed claim for compensation for dis-

ability with the said United States Employees' Compensation Commission under said Act, alleging that he was injured as the result of an accident while working for said employer during the latter part of May or the early part of June, 1942.

VI.

The cause was within the jurisdiction of the Deputy Commissioner for the Pacific District with headquarters at Honolulu, Territory of Hawaii, but with the approval of the United States Employees' Compensation Commission and as permitted by law, was subsequently transferred to the Fourteenth Compensation District, Wm. A. Marshall, Deputy Commissioner.

VII.

That the libellants herein gave due notice that said claim was controverted, and thereafter, at the first hearing of such claim, which was held before respondent on December 29, 1943, libellants interposed the following defenses: [3]

(1) That the said Tex M. Haddon failed to give notice of injury within 30 days as required by Section 12 of the Act.

(2) That said claimant failed to file claim within one year after the alleged injury as required by Section 13 of the Act; and

(3) That said claimant did not sustain any injuries as alleged or resulting disability therefrom. That at said hearing, the testimony of said claimant was heard and transcribed; that thereafter the

matter came on for an adjourned hearing before said respondent on February 8, 1944, at which time the testimony of claimant and one W. A. McFayden was heard and transcribed, and certain exhibits made a part of the record. That pursuant to oral stipulation, the testimony of additional witnesses was taken through the medium of written interrogatories.

VIII.

That thereafter on June 5, 1944 respondent made and entered his Compensation Order and Award of Compensation, a copy of which is attached hereto marked "Exhibit A" and made a part hereof as fully as if set forth at length herein. That said Compensation Order and Award of Compensation is not in accordance with law and with the provisions of said act, in this, that there was not at any time herein mentioned or at any other time, any substantial evidence before said respondent to support the finding that because of said injury, claimant was wholly disabled and that such disability continued at the time of the hearing in this matter held on February 8, 1944. That said Compensation Order and Award of Compensation is furthermore not in accordance with law and with the provisions of said act in this, that there was not at any time herein mentioned or at any other time, any sub- [4] stantial evidence before said respondent to support the finding that the average annual earnings of the claimant at the time of said injury amounted to the sum of \$5,668.00, and in making said finding, respondent failed to act in

accordance with the requirements of Section 10 of said act (33 U.S.C.A. Sec. 910). That in making said order and award, respondent acted capriciously and without giving due regard to the medical evidence submitted in the cause and to the requirements of Section 10 of said act aforesaid.

IX.

That the Liberty Mutual Insurance Company is joined as a libellant herein because said act provides for the substitution of the insurance carrier for the employer.

X.

That all the notices and the duly transcribed original notes of testimony taken in the cause and the original compensation order and award of compensation of respondent are in the custody of said respondent, together with all exhibits submitted in connection therewith, and it is necessary for this court to have possession of said records and all of the relevant papers in the possession of respondent in order to determine whether or not the Compensation Order and Award of Compensation of said Deputy Commissioner is in accordance with law.

XI.

That the libellants will be irreparably damaged if a mandatory injunction annulling and vacating said award is not granted them by this court.

XII.

That the libellants have not the right to appeal from the aforesaid Compensation Order and Award

of Compensation, and have no remedy available other than the redress requested [5] by libellants in the form and manner specified in said Act.

Wherefore libellants respectfully pray as follows:

1. That said respondent Deputy Commissioner, Wm. A. Marshall, be ordered to deliver to this court of the Clerk thereof, a certified transcript of any claim for compensation made in this matter, all notices, transcribed notes of testimony, exhibits, depositions, Compensation Order and Award of Compensation aforementioned, and all other papers and records, or matters relating to this cause or the hearing thereof.

2. That a time and place be set so that said matters and records may be fully heard and considered by this court.

3. That upon the hearing thereof, that said Compensation Order and Award of Compensation made by said respondent against libellants herein, be annulled, reversed, vacated, and set aside by mandatory injunction or otherwise as provided in the Longshoremen's and Harbor Workers' Compensation Act aforesaid.

4. That libellants be granted such further relief as may be meet and proper in the premises.

[Signed] JOSEPH J. LANZA

[Signed] EGGERMAN ROSLING & WIL-
LIAMS

Attorneys for Libellants

[Endorsed]: Filed July 5, 1944. [6]

EXHIBIT "A"

United States Employees' Compensation Commis-
sion Fourteenth Compensation District

Case No. DB-P-1-8269

In the matter of the claim for compensation under
Public Law 208, 77th Congress, Act of August
16, 1941.

TEX M. HADDON,

Claimant,

against

CONTRACTORS, PACIFIC NAVAL AIR
BASES,

Employer,

LIBERTY MUTUAL INSURANCE COMPANY,
Insurance Carrier

COMPENSATION ORDER AWARD OF
COMPENSATION

A claim for compensation having been filed in the Pacific District, and having been transferred to this, the Fourteenth District, by authority of the Commission, and such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following

FINDINGS OF FACT:

That during the early part of June, 1942, the claimant above named was in the employ of the

employer above named within the Pacific District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Act of August 16, 1941, as amended (42 U.S.C., Sec. 1651), to employees of contractors with the United States, and others, and that the liability of the employer for compensation under said Act was insured by Liberty Mutual Insurance Company; [7]

That during the said period of time claimant herein while employed as a plumber and while attempting with other employees to place a long, heavy pipe in an erect position strained his back, causing disability; that thereafter the claimant was given lighter work and continued in such employment until December 17, 1942; that thereafter the claimant because of his injury was wholly disabled and that such disability continued at the time of the hearing in this matter held on February 8, 1944;

That the average annual earnings of the claimant at the time of the said injury amounted to the sum of \$5,668.00;

At the time of the first hearing in this matter the employer and insurance carrier objected to the claim filed herein on the ground that no notice of injury was given the employer within 30 days after the injury, and also on the ground that the said claim herein was not filed within one year from the date of the injury;

I find that the claimant reported the said injury orally to his sub-foreman, and that he thereafter was given lighter work; that the employer's sub-foreman reported the injury to the general foreman; that the insurance carrier had knowledge of the injury in February, 1943, through an agency in Idaho which handled such cases for the carrier; that such agency arranged for the claimant to go to San Francisco in September, 1943, where he was examined by two different physicians for the insurance carrier; that the claimant filed a formal claim for compensation in the Pacific District on September 3, 1943; that the employer filed a report of the claimed injury on July 23, 1943; that in view of these facts the provisions of Section 30 (f) of the Act serve to toll the period of limitation in Section 12 (a), and that the period of limitation in Section 13 (a) did not begin to run until the report of the employer was [8] filed on July 23, 1943; that the failure of the claimant to serve written notice on the employer is excused because the employer had knowledge of the injury;

That as a result of the said injury the claimant has been wholly disabled from December 18, 1942, to and including January 27, 1944; that such disability continued at the time of the hearing held on February 8, 1944, and he is entitled to 58 weeks' compensation at \$25.00 per week for such disability and amounting to the sum of \$1,450.00; that Leo M. Koenigsberg, attorney, has rendered legal service to the claimant of the reasonable value of

\$175.00, and is entitled to a lien on compensation due claimant therefor.

Upon the foregoing facts the Deputy Commissioner makes the following

AWARD

That the employer, Contractors, Pacific Naval Air Bases, and the insurance carrier, Liberty Mutual Insurance Company, shall pay compensation to the claimant as follows: \$1,450.00, covering to and including January 27, 1944, less \$175.00 to be deducted therefrom and paid Leo M. Koenigsberg as his attorney; that subsequent to January 27, 1944, the employer and insurance carrier shall pay compensation to the claimant bi-weekly at the rate of \$25.00 per week during the continuance of such disability or the further order of the Deputy Commissioner; that the employer and insurance carrier shall furnish claimant with such medical, surgical and hospital treatment as may be appropriate to the further treatment and cure of his disability.

Given under my hand at Seattle, Washington this 5th day of June, 1944.

WM. A. MARSHALL

Deputy Commissioner, Fourteenth Compensation District. [9]

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer and the insurance carrier at the last known address of each, as follows:

Tex M. Haddon, 415 Adams Street, Lewiston, Idaho.

Contractors, PNAB, Attention Mr. Brash, PO Box 857, Oakland 4, California.

Liberty Mutual Insurance Co., 703 Market St., San Francisco, Cal.

Leo M. Koenigsberg, Central Bldg., Seattle 4, Wash.

Joseph J. Lanza, c/o Eggerman, Rosling & Williams, Joseph Vance Bldg., Seattle 1, Wash.

WM. A. MARSHALL

Deputy Commissioner.

Dated June 5, 1944.

WAM:KN [10]

#962

CERTIFICATION OF RECORD

Re: Tex M. Hadden, DB-P-1-8269

This is to certify that the record of proceedings before me in the above entitled matter consists of the following documents:

Transcript of testimony taken at a hearing held on December 29, 1943, consisting of 9 pages.

Transcript of testimony at a hearing held on February 8, 1944, consisting of 60 pages.

Original compensation order filed by me on June 5, 1944.

WM. A. MARSHALL
Deputy Commissioner
Fourteenth Compensation
District.

Seattle, Washington, July 6, 1944.

[Endorsed]: Filed Sep. 4, 1944. [11]

United States Employees' Compensation Commission,
Before Wm. A. Marshall, Deputy Commissioner,
Fourteenth Compensation District.

No. DB-P-1-8269

In the matter of the claim for compensation under
the Longshoremen's and Harbor Workers'
Compensation Act, as extended by Public Law
No. 208, 77th Congress, Act of August 16, 1941.

TEX M. HADDON,

Claimant,

against

CONTRACTORS, PACIFIC NAVAL AIR
BASES,

Employer,

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier.

TRANSCRIPT OF HEARING

Pursuant to notice the above entitled matter was

heard before Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District, United States Employees' Compensation Commission, at 300 Coleman Building, Seattle, Washington, commencing at the hour of 1:00 o'clock p.m. on December 29, 1943.

Appearances:

Claimant appearing personally and not represented by counsel.

Eggerman, Rosling & Williams, by Joseph J. Lanza, Attorneys for Employer-Carrier. [13]

Deputy Commissioner: In this matter a claim was filed in the Pacific District as established by the United States Employees' Compensation Commission under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by Public Law No. 208, 77th Congress, Act of August 16, 1941, and on September 7, 1943 the entire file, with the approval of the Commission, was referred to this District for such action as might be indicated.

Mr. Lanza: Let the record show that the Liberty Mutual Insurance Company, who is the insurance carrier in this matter, and the Contractor, the Hawaiian Dredging, object to the claim of the claimant filed herein upon the grounds:—first; that no notice of the injury was given to the employer or the insurance carrier within the thirty day period required by law, and the further objection is made that the claim for compensation was not filed within one year from the time the alleged injury took place

and the contractor and the insurance carrier deny generally the alleged injury and alleged disability of the claimant.

Mr. Haddon: How can they make those claims when they investigated this case While it was really a slow operation, I don't know who was at fault, the Morrison-Knudsen Company was notified by the doctor, in the first place, and it was very slow progress getting a reply back. When David Hart from the Adjustment Company came up there [14] it could not have been, I believe, sixty days after this claim was filed so I do not see——

Deputy Commissioner: I will swear you in and then let me question you and you feel free to make any statement you think is warranted.

TEX M. HADDON,

the claimant herein, having been first duly sworn, testified as follows:

Direct Examination

By Deputy Commissioner:

Q. When did the injury occur, please

A. Well, sir, I could not tell you the exact date but from the best of my knowledge it was the last of May or first part of June, 1942.

Q. How did it occur

A. Well, there was three of us standing a long section of extra heavy three inch cast iron stuck up for a vent line for the floor drain in the mess hall at Barber's Point Camp.

Q. In what way were you injured?

(Testimony of Tex M. Haddon.)

A. Well, I snapped something low down in my back. The best I could explain it would be if you would take and break a match in your fingers, and everything turned black for a second but I did not really realize it could be anything and it was pretty hot and I knew I was awfully nervous [15] immediately after and I told Al Clements and Robert Gibbs. I said, "I hurt my back", and sat down on something there and there was a long glimmer before my eyes like a heat wave.

Q. Did you have any medical attention?

A. No, other than I went to taking vitamin pills and kidney pills. I felt my kidneys might be causing something of my back aches and my legs were cramping.

Q. Did you continue to work? A. Yes.

Q. Until when?

A. Until the 17th of December, and it got so my legs would not stay under me to put in a shift.

Q. When did you report your case to anybody representing the employer as being a disability resulting from an injury?

A. Well, no one officially. I talked it over with many of my friends over there that worked with me, but really I did not think up until the time I got this cold and it settled in there and simply got me down that I was actually injured.

Q. After you terminated your employment you came back home? A. Yes.

Q. Did you take up work then?

A. No, sir, I haven't done a thing.

(Testimony of Tex M. Haddon.)

Q. You haven't done a thing? [16]

A. No, sir.

Q. Then, if the matter was not taken up with the employer over there, nothing taken up with the employer over there, when was the first time you did take it up with anybody; was that with Mr. Hart?

A. I went to Dr. White by special request of being forced by my wife to have my back x-rayed.

Q. When did you take it up with the employer?

A. Dr. White is the one that notified Morrison-Knudsen Company.

Q. The first knowledge they had was reported through the Nichols Adjustment Bureau in April of 1943?

A. Dr. White wrote Morrison-Knudsen Company and Morrison-Knudsen Company evidently took it up with the Liberty Mutual Insurance Company.

Q. For the record, I have asked you a lot of questions for the reason that all I have is the record received from Honolulu and that only reached here in September, don't you see, and that is the basis for some of these questions I am asking you?

A. That is perfectly all right; I haven't lied to anybody about it.

Q. Was that in April of 1943 when the matter was brought before them when your condition became worse?

A. No, this x-ray picture was made in February, last February, because when I got back, I got back a year ago yesterday, [17] I went to Spokane and

(Testimony of Tex M. Haddon.)

picked up the wife and brought her back and we visited on the Harbor.

Q. Then, this record shows that the Insurance Company filed a controversy in July of 1943; was any letter written to you with respect to that?

A. No, sir; my understanding was with Frisco was that after they had a talk with me of the case I did not even expect to have to have a hearing on it. That is the impression I was left with over there.

Q. The first information that came with regard to your case is indicated in my letter to the Deputy Commissioner at Honolulu, the letter being dated July 28, 1943. The letter states "that we were enclosing forms 202 and 207 in duplicate received by us today without any covering letter". "Now, we are simply forwarding them to the Deputy Commissioner". That is the first information we had regarding your case. That form 202 is the employer's report; that is the report that the employer has. That was received here on the same day, July 28 of this year. And then there was received in this office on September 13, 1943 a formal claim for compensation signed by yourself. Now, that is dated August 28, 1942; that clearly is in error, is it not?

A. That would be an error; that is positively an error because there was not nothing taken up before this year.

Q. Nothing was taken up before this year? [18]

A. That is right.

(Testimony of Tex M. Haddon.)

Q. Where did you get that claim? Who furnished you with that form, do you recall that?

A. Well, it seems to me it was sent through this office.

Q. No, I think that was sent from the Honolulu office?

A. Yes, that is right.

Q. So the claim itself is dated August 28, 1942, whereas it should have been August 28, 1943?

A. I believe.

Q. Our filing stamp shows it received here in September?

A. That is right.

Q. I want you to tell me when and to whom you made any report concerning your injury; the date and the person and all about it?

A. The exact date I can't.

Q. In relation to the date you were hurt; when did you report to anybody representing the employer?

A. Right immediately.

Q. To whom?

A. To Arthur Lukehardt, the plumbing foreman.

Q. You mean that day?

A. No, sir, just as quick as I got so I could travel at all, that is the first thing I done, I reported to him and he said, "Take it easy and don't lift anything", and they put me to work on the pre-fabricating department because from [19] then on I had trouble doing an honest day's work anyway so I did not do any heavy work. Also F. E. Williams was also a foreman and superintendant, it was kind of settled between him and a man by the name of Cook,

(Testimony of Tex M. Haddon.)

and they knew about it and many of my friends and my room mate from here in Moscow, he can verify every statement I have told you.

(Discussion off Record.)

Deputy Commissioner: The claimant has a paper or papers which he desires to introduce in the record. He is not certain whether he brought such papers with him to Seattle to attend this hearing. Because of this, this record will be held open for thirty days in order to afford opportunity to the claimant to make his presentation. [20]

CERTIFICATE

State of Washington,
County of Pierce—ss.

I, H. C. Walker, hereby certify that I am a duly qualified and acting Court Reporter in the State of Washington; that as such Court Reporter I reported in shorthand the above entitled hearing; that thereafter the same was transcribed under my supervision and the within and foregoing is a true and correct transcript of the proceedings had and testimony adduced in said hearing.

Dated this 31st day of December, 1943.

H. C. WALKER

Court Reporter.

[Endorsed]: Filed Sept. 4, 1944. [21]

[Title of Commission and Cause.]

TRANSCRIPT OF TESTIMONY
AT HEARING

Pursuant to notice, this matter was heard before Wm. A. Marshall, Deputy Commissioner, United States Employees' Compensation Commission, at 300 Colman Building, Seattle, Washington, at 3:00 p.m. on the 8th day of February, 1944.

Appearances:

L. M. Koenigsberg of Koenigsberg & Sanford,
Attorneys for Claimant.

Joseph Lanza, of Eggerman, Rosling & Williams,

Attorneys for Employer and Carrier. [23]

Deputy Commissioner: This matter comes on as a continuation from a previous hearing.

TEX M. HADDON

claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Koenigsberg:

Q. Will you state your name, please?

A. Tex M. Haddon.

Q. Mr. Haddon, you testified here on a previous occasion? A. That is right.

Q. I will show you what is marked Claimant's Exhibit No. 1 and ask you when you first saw that exhibit?

A. Well, sir, to the best of my knowledge, that

(Testimony of Tex M. Haddon.)

would have been around April, between the 8th and 10th, about that matter.

Q. Did you receive that letter in the mail?

A. That is right.

Mr. Koenigsberg: This letter, Mr. Marshall, is under date of April 6, 1943, and it is on Morrison-Knudsen Company, Inc., General Contractors', letterhead. It is addressed to Nichols Adjustment Bureau, First National Bank Building, Boise.

"Gentlemen: Enclosed is letter received at this office from Dr. E. L. White of Lewiston, Idaho, relating to the claim of Tex M. Haddon, presumably injured in May or June, [24] 1942, while employed by Contractors, Pacific Naval Air Bases.

We also hand you herewith the x-ray received from Dr. White and ask that you communicate direct with Dr. White.

Yours very truly,

CARROLL F. ZAPP."

Mr. Koenigsberg: We offer this exhibit in evidence.

Mr. Lanza: May I ask a question before we go any further?

Mr. Koenigsberg: Sure.

Mr. Lanza: Q. How did you happen to get a copy of this?

The Witness: A. Mr. Hart, he mailed me a copy of all the communications that he received.

Q. You got this through the mails?

(Testimony of Tex M. Haddon.)

A. That is right.

Mr. Lanza: No objection.

Mr. Koenigsberg: Q. Mr. Hart is the attorney and adjuster for the Nichols Adjustment Bureau?

A. At Boise.

Q. I show you Claimant's Exhibit No. 2 and ask you if you have ever seen that exhibit before? You have?

A. Yes.

Q. Did you get it in the same way as you received Claimant's Exhibit 1?

A. Well, sir, I think this was mailed to Dr. E. L. White personally, and he handed this to me in the envelope that he received it in.

Q. This is on a Nichols Adjustment Bureau letterhead, dated [25] April 7, 1943, and is addressed to Dr. E. L. White at Lewiston, Idaho. It says:

"Re: Tex M. Haddon. Dear Dr. White:

Your letter of April 1 in respect to the injuries of Tex M. Haddon, which letter was addressed to Morrison-Knudsen Company, Boise, Idaho, has been referred by that company to our office with a request that we communicate with you concerning the same.

Our office is usually assigned the job of investigating and checking into these claims. We have received no notice from the insurance company of this man's case. It is possible that it wasn't fully reported while he was on the Islands, which we would assume from the history that you relate concerning your interview with him. If you see Mr. Haddon within the course of the next day or two,

(Testimony of Tex M. Haddon.)

will you ask him to be patient for a few days until we can get some word back from the insurance company, and as soon as we hear from them we will get in touch with you and Mr. Haddon and be able then to advise you more concerning this man's treatment and the status of his claim.

Kindly address further communications in respect to the matter directly to our office until you are advised otherwise.

Yours very truly,

NICHOLS ADJUSTMENT BUREAU
OF IDAHO

By DAVID F. HART

Attorney & Adjuster."

Mr. Koenigsberg: Q. Now, at about that time or prior to that time did you have a conversation with Mr. Hart in reference to your claim?

A. No, no; he didn't show up till I believe April 25th.

Q. April 25th, that was the first time you talked to him? A. That is right.

Q. At that time, on April 25th, did you take up with him the [26] question of whether or not you should employ an attorney? A. I did.

Q. What did he tell you?

A. Well, sir, he told me it was very seldom that an attorney was necessary in these cases, because you were dealt with fairly and squarely and that I could rest assured of a square deal.

(Testimony of Tex M. Haddon.)

Mr. Koenigsberg: I offer Claimant's Exhibit No. 2 in evidence.

Q. I show you what has been marked as Claimant's Exhibit No. 3 and I will ask you if you received that letter in the mail at about the time it is dated? A. That is right.

Q. This letter is dated May 29, 1943, on letter-head of Nichols Adjustment Bureau, and it is addressed to Mr. Tex M. Haddon.

"Dear Mr. Haddon:

You will recall my visit with you April 25 at Lewiston, regarding your back injury. We have been instructed to see that you are given a thorough examination by an orthopedic specialist and from inquiries we have made would prefer to have that examination made by Dr. Jerome K. Burton of Boise. Such, however, would require a trip down here by you for that purpose.

We would like to know by return mail, if possible, if such a trip could be made. The bus connections down through Grangeville and New Meadows are fairly good for such a trip. It may be too strenuous a trip for you that way. It would probably be better to arrange to make the trip by train. If you can see your way clear to come to Boise we would, of course, have the company remit payment to you of your expenses in that connection. [27] Please give us a reply and we are enclosing self-addressed stamped envelope for your use in that connection. If, however, you know of a good orthopedic special-

(Testimony of Tex M. Haddon.)

ist in that area, kindly advise us as to whom it is. In the meantime, your accident and injury is being checked on in Honolulu and we should have some word before long concerning the same.

Yours very truly,

NICHOLS ADJUSTMENT BUREAU
OF IDAHO

By DAVID F. HART

Attorney & Adjuster."

Did you, in response to this letter of May 29, 1943, make arrangements to be examined in accordance with the outline of that letter?

A. I went down and consulted Dr. White, and he wouldn't permit me to go by stage; so I had to take the stage to Pendleton, but took the train from Pendleton into Boise. I landed at Boise I believe on June 7th and entered the hospital.

Q. How many days did it take you from Lewiston, Idaho, to Boise?

A. Well, I left Lewiston——

Q. How many days did it take you?

Deputy Commissioner: One day or two days?

A. One day's ride.

Q. How long were you in the hospital there?

A. I believe about a week.

Q. And you were in the hospital that they sent you to?

A. Yes; I preferred going there. [28]

Q. You were examined there by the doctor they furnished?

A. That is right.

(Testimony of Tex M. Haddon.)

Mr. Koenigsberg: We offer Claimant's Exhibit No. 3.

Mr. Lanza: No objection.

Mr. Koenigsberg: Q. I show you what is marked Claimant's Exhibit No. 4 and ask you if that is another letter received in the same fashion? This is addressed to you and you received it in the course of the mail?

A. That is right.

Mr. Koenigsberg: I will offer Claimant's Exhibit 4:

"Nichols Adjustment Bureau of Idaho
First National Bank Building,
Boise, Idaho.

June 3, 1943

Mr. Tex M. Haddon
415 Adams Street,
Lewiston, Idaho.

Dear Mr. Haddon:

This will acknowledge receipt of your letter of June 1 regarding proposed trip to Boise. I believe that you should plan on about two full days time here in Boise in the event the doctor requires you to go to the hospital for the purpose of this examination.

It will also probably take two full days travel for you to make the trip here and return.

(Testimony of Tex M. Haddon.)

Kindly advise us when you are leaving and when you expect to arrive in Boise.

Yours very truly,

NICHOLS ADJUSTMENT BUREAU
OF IDAHO

By DAVID F. HART

Attorney & Adjuster." [29]

Q. I show you what has been marked Claimant's Exhibit No. 5 and ask you if you received that in due course of the mails?

A. That is right, I did.

Mr. Koenigsberg: This is on Nichols Adjustment Bureau letterhead, is dated July 12, 1943, and is addressed to Mr. Tex M. Haddon.

"Dear Mr. Haddon:

"We are enclosing herewith Draft No. D61-42546 of the Liberty Mutual Insurance Company, dated July 2, 1943, payable to your order in the amount of \$28.28, which is for reimbursement for your expenses on your trip from Lewiston to Boise and return, for medical examination.

We are not yet in a position to give you any information as to the disposition of your claim for compensation benefits.

The medical reports from the doctors here in Boise have not all been completed, but we will get

(Testimony of Tex M. Haddon.)

in touch with you as soon as we have some information of interest.

Very truly yours,

NICHOLS ADJUSTMENT BUREAU
OF IDAHO,

By DAVID F. BART,
Attorney & Adjustor."

We offer Claimant's Exhibit No. 5 in evidence.

Mr. Koenigsberg: Q. I show you what is marked Claimant's Exhibit No. 6, and ask you if you received that in due course of the mails.

A. That is right.

Mr. Koenigsberg: This is a letter on the letter-head of Nichols Adjustment Bureau, dated September 3, 1943, and [30] addressed to Mr. Haddon:

"Tex M. Haddon vs. Hawaiian Dredging
C61,36616, XC92-14980

Dear Mr. Haddon:

This will acknowledge your letter of August 31st advising that you would endeavor to be in San Francisco the 14th or 15th of September for further examination.

Kindly take this letter with you and contact Mr. Tracy C. Chandler in the Claims Department of the Liberty Mutual Insurance Company, 703 Market Street, San Francisco, California. He will then take care of your from that point on.

We are advising the insurance company that you will be in San Francisco not later than September

(Testimony of Tex M. Haddon.)

15th, so kindly make your plans to be there not later than that date.

You can take the matter of your expenses for the trip up with Mr. Chandler after you arrive there.

We note that your address now is 415 Adams Street, to which we are addressing this communication.

Very truly yours,

NICHOLS ADJUSTMENT BUREAU
OF IDAHO

By DAVID F. HART

Attorney & Adjuster."

Mr. Koenigsberg: Q. Did you, in connection with that letter and what other correspondence you had had, make any arrangements for a trip to San Francisco?

A. I did.

Q. Who suggested that trip to San Francisco?

A. The letters that I received from Nichols Adjustment Company said that further examinations would be necessary and asked if I was willing to come to Frisco for the examination. I accepted immediately and was there on the [31] 14th day of September.

Q. Now, when you went to San Francisco, did you go to a hospital? A. Yes, sir.

Q. And did you go to the hospital that they advised you to go to? A. Yes, sir.

Q. How long were you confined in the hospital?

A. I believe about four days.

(Testimony of Tex M. Haddon.)

Q. Were you examined by a doctor that they employed? A. Yes, sir.

Q. Did you return immediately after your examination to your home in Lewiston, Idaho?

A. No, sir.

Q. Was that trip to San Francisco solely at their request or—— A. At theirs.

Q. Solely at their request? A. Yes.

Q. And the first time they made that request for a trip to San Francisco was September 3, 1943?

A. To the best of my judgment it was, according to the letter.

Mr. Koenigsberg: We will offer this Claimant's Exhibit No. 6.

Q. Now, from the time that Mr. Hart of the Nichols Adjustment Bureau, on April 25, 1943, advised you that it wasn't necessary for you to have an attorney, from that time on [32] did anybody, either Mr. Hart or anybody else in connection with this company, tell you to file a claim with the United States Compensation Commission?

Mr. Lanza: I object to that as immaterial.

The Witness: No.

The Deputy Commissioner: He may answer that for what it is worth.

Mr. Koenigsberg: What was your answer?

A. No, sir.

Q. When was the first time anybody suggested to you that you file a claim with the United States Compensation Commission?

A. When I received the form.

(Testimony of Tex M. Haddon.)

Q. You received a form?

A. I think there was one sent from the Hawaiian Islands I had to fill out, and I believe one from this office. I believe there were two filled out.

Q. You sent those out as soon as you received them?

A. That is right.

Q. When was the first time that you heard that anybody was denying liability solely on the grounds that you hadn't filed a form with the United States Compensation Commission?

A. The first I heard? When I was sitting here for the hearing on the 29th day of December.

Q. That was the first time anybody mentioned it to you at all?

A. That is right. [33]

Q. Now, going into the merits a little bit. Mr. Haddon, you left the United States for the Hawaiian Islands about what date, do you recall?

A. January 10, 1942.

Q. January 10, 1942?

A. I believe so.

Q. And what was your work at that time?

A. Plumber.

Q. How long have you been engaged as a plumber, in the work of plumbing?

A. Off and on for twenty years.

Q. What was your compensation to be in connection with this contract? How much per week?

A. That I never knew.

Q. You didn't know——

A. You mean——

Deputy Commissioner: Your wages?

A. Well, I signed——

(Testimony of Tex M. Haddon.)

Mr. Koenigsberg: If you can answer the questions quickly, without too much explanation. I will ask the questions and you answer directly because we don't want to clutter the record with too much verbiage. Do you know how much you were to receive?

A. The contract called for \$225.00 a month, but the scale was much above that. [34]

Q. How much did you actually earn while working there?

A. From \$109.00 to about \$120.00 a week.

Q. When did you start to work on this job?

A. On the 22nd or 23rd of January.

Q. And what kind of work were you doing?

A. Roughing in plumbing.

Q. How long did you continue?

A. To do that type of work?

Q. Roughing in plumbing?

A. I followed it—we might as well say all the time I was there, because I worked on the pre-fabricating bench after they put me on light duty.

Q. When were you injured, approximately the date?

A. Well, it was in June, I guess, beyond a doubt, because the wife she says the first communication that she received of it she talked it over with the landlady——

Mr. Lanza: This is purely hearsay and I object to it.

Mr. Koenigsberg: It was in June of 1942?

(Testimony of Tex M. Haddon.)

A. June, 1942, yes.

Q. What were you doing at the time you received the injury and how did it occur?

A. There were three of us standing up a long section, 3-inch extra heavy castiron vent line——

Q. And how long was that section?

A. Well, the best I remember it was about 21 or 22 feet long. [35]

Q. How much did it weigh, per foot?

Mr. Lanza: I guess that is immaterial, isn't it?

The Witness: I couldn't tell you exactly.

Mr. Koenigsberg: Q. Have you any idea what the piece weighed; that is, if you know approximately?

A. Oh, about 150 pounds, I believe.

Q. And the three of you were standing up this section? A. Yes.

Q. What happened?

A. We took it up and it was in loose sand and just about the time we got it up I slipped and felt a snap right here in my back just like you broke a match stem and everything went completely black for a little bit and I sat down upon a box or something there—I don't remember what it was—because I couldn't stay on my feet; I was feeling sick and pretty hot and then it got so I could see just a glimmer before my eyes like looking at a heat wave off the sand.

Q. What time of day was this?

A. It was right immediately after dinner be-

(Testimony of Tex M. Haddon.)

cause we thought we would feel a little more equal to the task after we had our noon hour

Q. Then did you work the rest of that day?

A. I went in and talked with Andrew Lukehart. He was the foreman, plumbing foreman.

Q. Yes? [36]

A. Due to the fact that I would either have had to go to Ewa or Honolulu, and that time would all come off my time and a half, you see that I would lose so much, I told Art that as long as I had reported to him I would wait a day or two and if my back got too sore I would go in and have an x-ray taken. So it just naturally lingered along and I kept gradually getting worse, but not so noticeably other than when I would wake up in the morning my back would hurt, my back and my legs cramped on me; and I figured it was due to the——

Q. Just a moment. What happened after you told him and this condition developed? What did he do?

A. Well, he put me out on the prefabricating bench, where I didn't have lifting or stooping to do.

Q. How long after this injury did he put you on this prefabricating bench? How long afterward? A. They kept me on that.

Q. How long after you had the accident was it that he first put you on the prefabricating bench?

A. Oh, afterwards. That was about, oh, 30 minutes after I had hurt my back.

Q. You mean you didn't even work the rest of

(Testimony of Tex M. Haddon.)

the afternoon on the regular work you had been doing? A. No, oh, no.

Q. You immediately went on this bench? [37]

A. That is right.

Q. Was that an entirely different type of work than you had been doing, ever since you got on the job?

A. No, I had done prefabricating stuff from the time I hurt my back.

Q. How long had you been doing the other type of work, other than prefabricating?

A. Well, let's see. That would have been from January 23rd until sometime in June.

Q. When did you start on the job?

A. On the particular job that I was hurt on, you mean?

Q. Wasn't it just one job you had on the Islands?

A. I worked on many, many buildings.

Q. I see. When did you start work on this particular job you were hurt on?

A. It would have been in May.

Q. And all the time you were working on this particular job you were doing roughing-in work, and not prefabricating work? Am I correct in that?

A. We prefabricated this job. This is the first one we did prefabricating—that was the whole trouble, that they built up too long sections. That was the first job, and we had trouble because they

(Testimony of Tex M. Haddon.)

wanted us to fill it with sand before they would let us lay our plumbing in.

Q. After you prefabricated when did you start doing this [38] actual erection work?

A. That would have been some time during the fore part of June.

Q. The fore part of June? A. Yes.

Q. Then you hadn't been doing that actual work very long before you were injured? A. No.

Q. Then when you were injured they put you back on prefabricating? A. Yes.

Q. And immediately put you back?

A. That is it.

Q. And in connection with prefabricating did you have to do any heavy lifting? A. No.

Q. None whatsoever? A. No.

Q. Prior to the time you went to work for this company and prior to the time of the accident, what was the condition of your general health?

A. Good.

Q. What about your back and legs?

A. They never bothered me before, either my back or my legs, in my life.

Q. After this injury occurred what difficulty did you exper- [39] ience with your back and your legs?

A. I would wake up and be sore. My back sometimes was so sore I could hardly get up and then whenever I would straighten up cramps would hit me in my legs. The calves of my legs knotted up.

Q. How long did that condition persist?

A. That continued on from that time.

(Testimony of Tex M. Haddon.)

Q. Has it changed since that time to this day?

A. Not too much.

Q. What about the pain in your back?

A. Well, the back it gets awful sore if I am on my feet too long. It feels as if I was cut in two and the two sore edges come together.

Q. Have you experienced that feeling from the time you were injured? A. That is right

Q. Prior to the time you were injured what did you do of an evening when you got through work?

A. Oh, I would play pool and loaf around.

Q. What did you do after the injury?

A. I spent my time on my back.

Q. Went to bed immediately?

A. I did, every bit of time that I could.

Q. Now, this injury occurred in June and you worked on in that fashion for how long over in the Islands? [40]

A. I worked on until the 17th day of December, 1942.

Q. Then you came back to the States?

A. Yes.

Q. Did this disability that you experienced immediately after your injury improve or get worse?

A. Oh, I got a cold that settled in there and that got me down.

Q. Did it ever improve from that time to this?

A. It may be a little better now, although I couldn't say it is, because my whole legs will get so sore I could hardly get on them, a couple of weeks I could hardly stand up.

(Testimony of Tex M. Haddon.)

Q. Now, when you came to the States, did you go to work? A. No.

Q. Why didn't you go to work?

A. I didn't feel like I could work. I went and got a job, I thought I was all right to go to work, but I see I couldn't.

Q. Where did you go to get a job?

A. At Kent. Mac Boyker Plumbing Company, at Kent.

Q. Washington? A. Yes.

Q. How long did you work?

A. I didn't go to work at all.

Q. Why didn't you go?

A. Because I got to feeling so rotten that I couldn't work.

Q. Did you actually come to Kent? [41]

A. Yes, I come there with the intention of going to work and I just simply, I couldn't get so I could stay on my feet no length of time, so I went back to Lewiston where I could live cheaper, and rented an apartment to convalesce for a while.

Q. So you took the trip from Lewiston to Kent?

A. No, from Spokane to——

Q. Kent? A. ——to Auburn.

Q. For the purpose of taking this job?

A. Yes.

Q. At how much per week?

A. \$1.68 an hour.

Q. When you arrived at Kent you couldn't take the job? You felt you weren't capable of doing so?

(Testimony of Tex M. Haddon.)

A. Yes.

Q. Have you ever tried to work since?

A. No, sir.

Q. Are you able to work? A. I am not.

Q. What about your occupational trade? Is there plenty of work available?

A. Seems to be plenty of advertising for it.

Q. Has that condition existed all the time since you came to the States? [42] A. Yes.

Q. How much do you plumbers get—you say you were in the plumbing business before?

A. That is right.

Q. And I suppose you worked with lots of plumbers that you know?

A. Quite a number.

Q. How much do plumbers that have equal skill with you and do the same kind of work you were capable of doing before your injury, how much do they earn approximately?

A. Well, they haven't earned less than \$1.25 an hour, is the smallest scale I have known of since 1923 or 1924.

Q. I am asking you, since you came back from the Hawaiian Islands.

A. I think the pay is \$1.68.

Mr. Koenigsberg: You may take the witness.

Cross Examination

By Mr. Lanza:

Q. I think you stated that when you were injured you told Mr. Lukehart, the foreman?

(Testimony of Tex M. Haddon.)

A. That is right.

Q. And it was decided that you were to wait a few days before you went over for medical treatment or examination? A. Yes. [43]

Q. Why didn't you follow that up?

A. Because this back injury just gradually come on and I thought it was on account of the absence of minerals or vitamins or my discomfortable bed that was causing a lot of my ill feelings.

Q. If you felt that you were injured did you ever think of having x-rays performed?

A. I did. I told them—they wanted to dispatch me back—they wanted me to take 60 days out and dispatch me back and I told them it all depended greatly on an examination, that I had to have an examination and see what I had did to my back.

Q. No one prevented you from having x-rays taken a short time after the injury?

A. No, sir; no one objected to it, no.

Q. You made no request for it?

A. No, no; I didn't.

Q. You just continued to work?

A. That is right.

Q. And you thought it was due to the water you were drinking or——

A. I figured that—they claim there is no minerals on the Islands at all, you see, and I thought probably it was due to the absence of minerals and I even got the idea it might be my kidneys, so I took some Doan's Kidney Pills [44] and I rubbed my back with rubbing alcohol and my legs; and I

(Testimony of Tex M. Haddon.)

took vitamin tablets. I kept thinking—I couldn't get it through my head that I could actually be hurt. That is the truth of it. I couldn't think anything like that could render me unfit as it actually did.

Q. How do you know that was the cause of your subsequent incapacity?

A. Well, sir, when I got back here and a cold settled back there and every time I moved it stabbed me like a knife and I just suffered—well, why should it stay in that particular spot?

Q. A lot of people experience those pains after a cold. How do you know this particular ailment was due to that accident?

A. Why should it happen at that time—since the accident and never happened before?

Q. You were in doubt, weren't you, right after the accident, thinking it was due to minerals lacking or your bed?

A. Yes.

Q. There was some doubt as to whether or not the injury produced your subsequent trouble?

A. There was a doubt in my mind to a certain extent until these doctors——

Q. Has any doctor ever told you this particular—your present condition, I might say, is due to any injury you received? [45]

A. No, I have been to the doctors suggested by the insurance company.

Q. No, Mr. Haddon, Dr. White was not——

(Testimony of Tex M. Haddon.)

A. Outside of Dr. White, and he x-rayed my back.

Q. And the first time that any doctor was suggested was after you went to Dr. White, by the insurance company?

A. The only doctors I went to was suggested by your company since I went to Dr. White, yes, sir.

Q. When you went to Dr. White it was as the result of having contracted a cold and the pain settled in your back?

A. Severe pain settled in my back.

Q. You didn't think at that time it was still the aftermath of that injury?

A. When it hit me in that particular spot where I felt this snap I knew then that was my trouble.

Q. No one prevented you or discouraged you from filing a claim up to that time that you went to Dr. White, did they? A. No.

Q. As a matter of fact, when you returned to the mainland at Alameda, that was about December 24, 1942, wasn't it?

A. The 28th, I believe.

Q. You recall being handed a statement?

A. Yes.

Q. And in which you were permitted to write down any complaints that you might have against the company for wages due or [46] any complaint of anything that may have occurred?

A. Yes.

Q. Did you notify them at that time that you had been injured?

(Testimony of Tex M. Haddon.)

A. I told them about it at the office, but due to the fact that I didn't fill that out was because my eyes was glimmering, it was glimmering before my eyes, I couldn't fill it out.

Q. Do you recall making a statement at that time that \$39.50 was held out of your wages for account of hotel bills going out? A. Yes, sir.

Q. And also that you stated "my contract was signed on the 23rd and was dated the 24th." I mean one day short? A. That is right.

Q. Your eyes weren't glimmering to prevent your writing that down?

A. I was at the office and that was the time I told them about my back and that I wasn't making out a further statement for employment because it depended greatly on what shape my back was—whether I had to have an examination.

Q. Do you recall signing the statement?

A. Yes.

Q. Do you recall reading it before signing?

A. I tried to read it, and filled it out the best that I [47] could see.

Q. What caused your eyes to glimmer at this particular point?

A. They never stopped from the time I got the back injury.

Q. They were glimmering all the time?

A. Up until about the—I believe the last of May or June.

Q. Of 1942? A. 1943.

Q. Wait a minute. Let's get this straight.

(Testimony of Tex M. Haddon.)

Deputy Commissioner: You are talking about December, 1942, and he is talking about——

Mr. Lanza: Q. I am talking about the time preceding December, 1942. Were your eyes glimmering before that?

A. My eyes glimmered from the time my back was injured.

Q. From June, 1942? A. That is right.

Q. To December at least your eyes were glimmering all the time? A. Yes.

Q. Were you able to do your work under those conditions?

A. Well, it was difficult, very difficult. In fact it ruined a pair of glasses that I only had about five months, and very often I would have to take off my glasses and look and then put my glasses on, and things didn't look right. I had even difficulty in reading my mail from home on account of my eyes.

Q. Do your eyes glimmer now? [48]

A. No. They quit here about, just about two months ago now I got these glasses.

Q. How did that come about? Would it just be present all the time or——

A. Well, it seems that if I tried to see anything and it was difficult to see and it was a strain on the eyes, and then it was just a glimmer like looking at a heat wave off the hot sand.

Q. Would it last a long time?

A. It was more or less constantly. I couldn't read.

(Testimony of Tex M. Haddon.)

Q. How long would it last.

A. Well, if I would look at anything, stare at anything now, I couldn't read the rest of the day at all; and I couldn't read a very little bit till that would start. I would read a line or two, maybe three and it would start from the strain of my eyes.

Q. And have these new glasses improved that?

A. Yes, they have. My eyes has got back now where I hope they will be satisfactory, but it takes a lot of improvement.

Q. Do you recall that part of your statement that referred to concerning your wages that were held out?

A. I don't remember that. I went out there and registered this complaint because I figured that I was that much short and that they was supposed to pay that according to [49] the contract.

Q. When you signed it didn't know what you were signing?

A. The employment sheet?

Q. No, this sheet at Alameda, December 24, 1942?

Mr. Koenigsberg: Why don't you show him the sheet?

Mr. Lanza: I haven't the original. This is a copy.

The Witness: A. That I don't remember. I positively don't remember that.

Mr. Lanza: Q. You recall signing the statement at that time, don't you, reporting about your wages?

(Testimony of Tex M. Haddon.)

A. I remember that I signed that I was short on my wages I think is all.

Q. And you didn't sign anything with respect to the injury?

A. I don't think that she wrote down anything, and I am quite sure that I didn't, but I was talking to her at that time when we went out there about the injury.

Q. That was a girl in the front office that you may have talked to?

A. It was a girl. I wouldn't say what office it was. It was where I was supposed to put in my claim for the money that I figured I had coming.

Q. As a matter of fact, Mr. Haddon, you didn't make any complaint about your injury at that time, did you? A. Which? To that girl?

Q. Yes. [50]

A. I told her about it, yes.

Q. Did you tell her casually or as a matter of making a claim at that time?

A. Well, I figured that it was as much making a claim as anything because I gave her the answer why I didn't make out or fill out for further employment.

Q. Why didn't you make sure that that was in writing before you turned it in?

Mr. Koenigsberg: I think that is immaterial.

A. Well, I will tell you now that there might have been quite a few things, queer things——

Mr. Koenigsberg: I don't think that is material. I think that is very argumentative, why he didn't

(Testimony of Tex M. Haddon.)

do that. He said he told her about it. I think that is arguing with the witness.

Deputy Commissioner: Yes, that is true.

Mr. Lanza: He signed the statement——

Deputy Commissioner: Your questions as to the statement are all right, but not the reasons.

Mr. Lanza: Q. You recall reading the statement before you signed it?

A. I tried to read it, it was foggy and I couldn't make it out. The lines blurred to where I really couldn't see. If you've got the original you will see probably it wasn't made out right. I knew it wasn't but I couldn't help it. [51] Everybody stam-peded and wanted off the boat and I couldn't see.

Q. You thought you had a claim against the company at that time? A. I did, yes.

Q. You told the girl you had a claim?

A. I told her I wouldn't make out their work sheet for any further employment until I found out what had been done to my back through the injury.

Q. Still you didn't do anything until you went to see Dr. White in April? A. In March.

Q. This letter of Dr. White is dated in April.

A. I think I can show you the receipt for the X-ray pictures of March 8th, if necessary.

Q. And no one prevented you between December 24, 1942 and March from filing a claim, did they?

A. I thought that I had taken all necessary steps that there were to be taken. I had notified the Department.

(Testimony of Tex M. Haddon.)

Q. Answer the question.

Mr. Koenigsberg: Counsel, I think you elicited the answer you are receiving.

Mr. Lanza: Nobody held his arm or anything of that nature.

Mr. Koenigsberg: He doesn't say.

Deputy Commissioner: That is a legitimate inquiry, to find out what his condition was and what he thought during [52] those several months.

Mr. Lanza: Q. Upon returning to Washington, you arrived at Kent and you couldn't take a job because you didn't feel well?

A. That is right.

Q. Was there any doubt in your mind then as to the cause of your disability? A. Yes.

Q. You didn't know yet whether it was due to the injury?

A. No, there was no doubt in my mind then, because my legs simply wouldn't stay under me. Then I looked for an apartment. My legs wouldn't stay under me and I knew then it was the same old stuff.

Q. Due to the injury? A. That is right.

Q. Why didn't you make out some claim or report it to someone at that time?

A. I reported it as soon as I was sick then. To tell the truth I got over there and a cold got me down. As quick as I could get to the hospital to file any claim or make notification of it, I did so.

Q. That was in March, you say, the latter part of March?

(Testimony of Tex M. Haddon.)

A. I was in there too for a month with my back at Lewiston, Idaho, 1734 Seventh Avenue.

Q. You were in Kent, Washington, for how long? [53]

A. I was in Auburn for, I believe, about a week.

Q. Were you on your back then?

A. No, I was still staggering around, but that is about all.

Q. How did you travel? Did you go to Lewiston from there? A. I did.

Q. How did you travel? A. By train.

Q. And that would place you in Lewiston about when? A. Around the 9th day of February.

Q. What were you doing from December 24th, 1942, to that time then?

A. From December 28th, I came—I left the 29th, I guess it was, left San Francisco and went to Spokane, picked up my wife and went to Auburn and visited relations there, came to Seattle from Auburn for a week; went out to Auburn and they talked us into coming over here, so I went to Spokane and brought my stuff over and was going to go to work. I found I couldn't go to work and went back to Lewiston because I could live cheaper there and rented a place to try to get over my illness.

Q. When did you first contact a doctor?

A. I believe it was on March 8th.

Q. So you were there from February 9th to March 8th before you saw a doctor?

A. Yes. [54]

(Testimony of Tex M. Haddon.)

Q. Claimant's Exhibit 1 is dated April 6, Mr. Haddon, from the Morrison-Knudsen Company, in which they stated they were enclosing a letter received from Dr. White in regard to your claim. Do you mean to tell us that Dr. White waited a whole month before he wrote this letter to Morrison-Knudsen? A. Yes.

Q. Have you got anything to show when you went to Dr. White?

The Witness: Where is the receipt for the X-ray I mailed you?

Mr. Koenigsberg: Have I got that?

The Witness: You have got it. It is March 8th.

Mr. Koenigsberg: Yes, that is right.

Mr. Lanza: This indicates that you had an X-ray taken on or about March 8, 1943?

The Witness: That is right.

Mr. Koenigsberg: Signed by——

Mr. Lanza: Mrs. E. L. White. Is that his wife?

The Witness: Yes, sir.

Q. What did he tell you with respect to that X-ray?

A. Well, sir, he thought the fifth lumbar was damaged. But the truth of it was my nerves was shot so bad and I had that cold, that my flesh was just a working and I was shaking all the time, and I couldn't lay still enough on the X-ray table that they could take a decent picture of me.

Q. Did Dr. White or any doctor ever tell you that your [55] condition was due to an injury that you had received a year previously?

(Testimony of Tex M. Haddon.)

A. No. The only thing was that he didn't know, there was nothing he could do for me. That is why they notified them to see what they would do.

Q. At the time you went to Dr. White you were interested in medical treatments of some sort?

A. Yes, sir, I was looking for relief; yes, sir.

Q. Then Dr. White referred you on to the Morrison-Knudsen Company?

A. That is right.

Q. And they in turn referred it to Nichols Adjustment Bureau?

A. That is right.

Q. When you first received a letter from Nichols Adjustment Bureau weren't you concerned principally with receiving medical treatment?

A. Yes, indeed I was.

Q. You didn't have in mind any filing of a claim for lost wages or anything of that sort, as a matter of fact?

A. I hadn't even thought of filing a claim until that got me down.

Q. Didn't you understand all their letters and correspondence were with reference to medical attention?

A. Well there was one there, it states—I can't word it just exactly, but I take it they did say that I was to be dealt [56] with fairly.

Q. You understood then that they were trying to ascertain what was wrong with you?

A. Yes.

Q. To see if they could——

A. Yes.

(Testimony of Tex M. Haddon.)

Q. —possibly suggest any cure?

A. That is right.

Q. Up to that time you didn't even think of filing a claim?

Mr. Koenigsberg: Counsel, I think if a man doesn't know he has a claim or anything of that nature, that hasn't anything to do with the merits of the controversy. Certainly your client wasn't talking about just giving him medical service.

Mr. Lanza: Q. In your direct testimony, if I took down the statement correctly, you said immediately after your injury you talked with Andrew Lukehart? A. That is right.

Q. You talked to him and you thought that as long as you had reported the accident you were in the clear? A. That is right.

Q. Did you know about this act in question at that time, that you were entitled to——

A. The only thing I knew was they had a bulletin posted on the wall that if you were injured in any way you had to [57] report either to the foreman or the dispensary within 24 hours. That is the reason I reported it to him because I thought it was necessary that they knew it and, frankly, I didn't feel I could work right at the time, so I went in and talked it over with him.

Q. Didn't you further know that if you were actually injured on the job you would be entitled to disability benefits?

A. I hadn't really given it a thought. I was under contract and it is a cinch I wouldn't if I

(Testimony of Tex M. Haddon.)

could possibly have stayed on given up \$125 a week for a lousy \$25 a week.

Q. When you got back to the mainland you weren't receiving that wage?

A. I would have been if I could have went to work.

Q. Still you didn't see fit to file a claim?

A. I didn't know. I thought that I had notified them and I had went as far as I knew anything about it. As far as federal unemployment compensation come into the picture it was absolutely greek to me, because I didn't know it existed. I thought I was dealing with the insurance company.

Q. How do you know you were injured in June?

A. That was at the time we was laying in the ground work——

Q. Do you recall——

A. ——on this particular job.

Q. Do you recall when you did file a claim, stating the injury [58] occurred either in May or June?

A. Yes.

Q. Is there still that uncertainty on checkup since?

A. Well, I will tell you. The wife and my roommate convinced me that I was hurt in June, about the middle of June, because she—the first letter that she received from me about it she talked it over with the landlady just before leaving for Spokane on July 3rd.

Q. Who were the individuals working with you at the time?

(Testimony of Tex M. Haddon.)

A. Al Clements was my helper and Robert Gibbs, another journeyman, were working there.

Q. Did they actually see you at the time of the injury? A. I sat down and talked with them.

Q. Was that before or after you talked with Mr. Lukehart?

A. That was before I talked to Mr. Lukehart.

Q. Do you recall testifying at the first hearing in this cause that you had talked to many of your friends about your injury, but to no one officially?

A. Yes, I had talked it over with many of my friends; in fact, this lumber foreman that furnished me the rubbing alcohol that I spoke about——

Q. Who was that? A. John March.

Q. Where is he, do you know?

A. No, I don't. Probably in a short time I could tell you [59] where Gibbs and Clements is.

Q. Had you taken vitamin pills before this time? A. No.

Q. What made you think it was the water or no minerals that produced your trouble?

A. Just hearing them talk about no minerals there, and just general run of conversation.

Mr. Lanza: I believe that is all, Mr. Marshall.

Redirect Examination

By Mr. Koenigsberg:

Q. You say that the two men working with you were Gibbs and who else? A. Clements.

Q. You are trying to locate them now?

A. Yes, I wrote them a letter. I wrote to Ala-

(Testimony of Tex M. Haddon.)

meda and got their address, wrote on the 12th and got a reply on the 24th, and I wrote them I believe on the 24th.

Q. 24th of January? A. That is right.

Q. You haven't had any reply to your letters?

A. No.

Q. Where are they?

A. Carpenterville, Oregon, Clements was; and Gibbs was at Houston, Texas. I believe probably I have the receipts here. [60]

Q. That is all right. As I understand your testimony on cross examination, when Dr. White examined you he told you that you had some difficulty in your lumbar spine?

A. That is right.

Q. And he didn't tell you, as you stated, he didn't tell you that that had anything to do with the accident, is that correct?

A. No, he didn't tell me.

Q. Is he an orthopedic man, is that his specialty?

A. No, he is a medical doctor.

Q. General practitioner. You have not been to any orthopedic doctor on your own account?

A. No, sir.

Q. In connection with that, Mr. Marshall, I had written to Mr. Haddon to come here on the 4th and I thought he would be here in time to have an examination by Dr. Wyckoff. I would like to have permission to have an examination by an orthopedic man, either Dr. Wyckoff or somebody else, and introduce that in the record.

(Testimony of Tex M. Haddon.)

Deputy Commissioner: That will be arranged.

Mr. Lanza: I would like to file the report of Dr. O. W. Jones, Jr., San Francisco, dated September 17, 1943.

Deputy Commissioner: That will be Employer's Exhibit A.

Mr. Lanza: And the letter or report of Dr. Frederick G. Linde, of San Francisco, dated September 22, 1943. [61]

Deputy Commissioner: That will be marked Employer's Exhibit B.

W. A. McFADYEN,

a witness called on behalf of Claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Koenigsberg:

State your name.

A. W. A. McFadyen, F-a-y-d-e-n.

Q. Mr. McFadyen, where do you reside?

A. Moscow, Idaho.

Q. Did you come over here especially for this hearing? A. I did.

Q. When did you first meet Mr. Haddon?

A. When we left for the Islands, that was December 21, 1941.

Q. You were both employed by the same employers?

(Testimony of W. A. McFadyen.)

A. Same company, Morrison-Knudsen of Boise.

Q. What was your occupation?

A. Plumber.

Q. And his occupation?

A. He was a plumber.

Q. But you had never known him?

A. No, never known him before, other than I met him the day we signed up, and he went and took his medical or he let me take my medical examination ahead of him because I was [62] in Moscow and he was living then in Lewiston and he went down the next morning. I went and took my examination the evening before.

Q. When you went on the job where did you first go to work for this company in the Hawaiian Islands?

A. What they called Barber's Point, on Oahu.

Q. Did you work right alongside of him?

A. No, I didn't. I roomed with him all the time; but there was a few days, possibly two weeks out of the time we were over there that we were actually working side by side. We were working on different jobs. That is, when we first went over we were working on a big latrine there and then I went on another job and then I came back and we were both working, we were building barracks. In these barracks he was working some and I was working and I saw him every day, you know, while working. And then we roomed together all the time.

Q. So you saw him every night?

(Testimony of W. A. McFadyen.)

A. I saw him every day except six or seven days I was in the hospital over there, from the time we left Lewiston until we got back to Spokane a year later.

Q. You were gone about a year altogether?

A. A year and ten days.

Q. Prior to the time he was injured what was his general condition, so far as you could see? [63]

A. How do you mean?

Deputy Commissioner: His health?

A. Oh, yes. He always seemed peppy and full of life, a hard worker up until, as I remember, along the latter part of June, he started to complain about his back and his legs bothered him, gave him cramps at night when he would lay down.

Q. Up to that time did he complain about his back?

A. No, he never mentioned it that I can recall at all.

Q. Did he walk and work normally?

A. Yes.

Q. What would you say then as to his general ability to work and general physical condition, so far as you could see up to that time?

A. Well, up to that time—I think there was possibly 50 or 60 men living at the same barracks, we all worked together, and Tex was considered one of the hardest workers on the project at the time.

Q. Did he, on the day that the alleged injury occurred, tell you about it?

(Testimony of W. A. McFadyen.)

A. I won't say whether it was the day it happened or shortly afterwards. I know I remember him saying about lifting this pipe, but whether it was that night when he came in or the next night when he came in after work, that him and two other boys were lifting this piece of saw pipe that [64] they mentioned about his back.

Q. After that was there any change in his general conduct, in the general way he worked or——

A. Yes, there was. The fact is that up until that time—I don't know whether you have been in a camp where a lot of men have to make their own amusement to a certain extent and Tex was out with us, you know, we would get out and monkey around, but after that happened I noticed that he stayed on his bunk, just about as soon as he left the mess hall at night. I was working on a maintenance job at that time and I wasn't in the barracks some nights, as I would otherwise. Sometimes he would work in the mess hall or something like that, but he seemed to stay on his bunk an awful lot from that time until we got home.

Q. Was there anything else he did from that time on which he didn't do before?

A. He never went uptown, never left camp. We used to go to Honolulu on days we had off and we had possibly, oh, I would say it was about a mile or a little better from where the camp was to where we caught a bus, and I know him and I would start walking off, and we used to try to walk the legs

(Testimony of W. A. McFadyen.)

off the other, and after that he didn't have any get-up and go about walking, and he would say, "Heck, what's all your hurry?" I noticed that.

Q. Did he complain about his back or legs after that? [65]

A. He used to complain about his legs cramping on him. , That is, we would go to bed and I used to really wake up laughing at him because he would hop out of bed and have a cramp in the calf of his leg and it seemed to go down into the foot and go up into what I presume they call a charley-horse. As to that, these cots we were sleeping on were just—they weren't coil springs, just a flat spring cot, and he used to take a jacket that he had there and put it, try to put it up under the mattress to give some support to his back to kind of push him up that way. I know he used to be cussing the Filipino boy who looked after the rooms for always pulling the jacket out from under the mattress, because every night he would have to go and dig up his jacket and put it back under. It seemed to relieve his back by having it under him. But up to that time he had never had, never used that or complained about it at all.

Q. Did he change the type of work he was doing immediately after the report of the injury?

A. Yes, the foreman that he had put him on bench work, that is, prefabricating. I presume you understand what we mean by prefabricating in plumbing, where all the joints are put together, the elbows and bends and t's and y's. They are all

(Testimony of W. A. McFadyen.)

small pieces and done on a bench by standing them up and connecting them by pouring through lead. [66] The work is a lot lighter than where you are wrestling possibly two or three or four lengths of 5-foot sawpipe. Four inch sawpipe, I presume, weighs around 10 or 12 pounds to the length, you know. You get four or five of those together, they weigh up pretty fast, especially when you've got lead poured in that. I know he was on prefabricating from then on. Art promised him that. I wasn't working on that job but I knew the fellows working with him and I knew he was working on this prefabricating bench from that time.

Q. And from June he never went off the fabricating?

A. Not that I know of, other than possibly working a water bench. We were working, we tried to leave the job on the job; instead of talking about it at night when we got back in. That was one thing that bunch around our barracks agreed on was leaving the job at night until you went on it the next morning, because it used to get so you were working 24 hours a day if you did so.

Q. Outside of these complaints as to his back and these cramps in his legs, which was his general conduct as to energy and vitality? Did you notice any difference?

A. He just didn't seem to have the pep that he had before. Him and I used to scuffle a little bit and after that we never did. We did a lot of jawing at each other but however we never did scuffle.

(Testimony of W. A. McFadyen.)

I noticed there were two or [67] three other boys, younger boys along about 20 or 21 and they used to come in and wrestle around with Tex. They all liked him and after that he just wouldn't—didn't want to be scuffling at all.

Q. Now, when you got back, did you go to work?

A. I went to work about three weeks after I got home.

Q. And how much would you consider that Tex, from what you know about his workmanship, would you consider that he would be capable of holding the same kind of jobs that you hold?

A. Certainly.

Q. How much have you been earning since you came back to the States?

A. \$1.65 an hour for a 40-hour week, double time for overtime, and we were working either 8 or 9 hours a day. That is 5 days a week and sometimes 6, but my checks would average around \$96 a week.

Q. That has been your average ever since you came back?

A. Yes, for 10 months last year. I think that would just about average out there, 10 months, because I took leave off and went up and helped my dad during harvest season, and I don't know just exactly the figures of what I made last year. My wife looks after that for income tax.

Q. Do you know anything about when you are

(Testimony of W. A. McFadyen.)

injured on the job about filing a claim with the compensation commission? [68]

Mr. Lanza: I submit that is immaterial.

Deputy Commissioner: It is what claimant knew that counts.

Mr. Koenigsberg: You may inquire.

Cross Examination

By Mr. Lanza:

Q. Where do you reside at the present time?

A. Moscow, Idaho.

Q. Do you have an address there?

A. 109 South Jackson. I moved from Spokane there on the 11th of December.

Q. 1943?

A. Yes, just a month and a half ago.

Q. After moving to Moscow, have you seen Mr. Haddon frequently?

A. No, I haven't seen him at all.

Q. When did you see him the last time before making your trip to Seattle?

A. I hadn't seen him at all since we left the boat after we got off the train at Spokane.

Q. How do you happen to be here?

A. He wrote me. He called me on the phone. He wrote me a letter about a week ago, no, more than that. You wrote me a letter, I don't know just what date that was and Tex had wrote me then that you were going to write me.

Q. This was all very recently? [69]

A. Yes, since I went to Moscow.

Q. You didn't talk over this case before that?

(Testimony of W. A. McFadyen.)

A. Positively. I didn't know anything about it, other than that one of the—there was a man late last spring—I wouldn't mention dates because I don't remember when it was, but he came and saw me last spring sometime. I feel quite certain in the spring because I was working at the rolling mill at the time and he asked me if I remembered about Tex Haddon getting an injury over in the Islands and I said yes and I was just going to work and was in a hurry and he met me at the elevator when I come in that morning. Other than that, that was all that was mentioned. We talked a few minutes about it.

Q. Did you see Mr. Haddon after returning to the United States?

A. Him and I came from the Islands to Spokane together and I left him, that was New Year's, day before New Year's, wasn't it a year ago.

Q. 1943? A. Yes.

Q. Then you went on to——

A. I went on to Moscow a couple of days afterwards. I stayed in Spokane and visited a couple of days with my sister and wife. My wife had been living in Moscow all the time I was away and we went down there for 3 weeks.

Mr. Koenigsberg: This is so prolix now. [70]

Q. Have you been corresponding with Mr. Haddon?

A. I think I have had two letters from Mr. Haddon in the last year. One time he mentioned that he was down—his back was bothering him, and he had wrote that letter to me in Moscow not

(Testimony of W. A. McFadyen.)

knowing that I had gone to Spokane to work.

Q. About his complaints on the job. Did he lead you to think it was due to an injury he received or due to his bed and the lack of minerals in the water.

A. He mentioned at the time when he was lifting that pipe that he strained his back. Then he mentioned, well, maybe it was a case of where the darned bed is, as he mentioned it, if it was a little more comfortable maybe his back would feel better. And I do recall his mentioning something about if there was some mineral in this water it might help all the fellows, because we were all getting sluggish from the continual, every day was the same in the weather.

Q. It was pretty hard work, wasn't it?

A. It was pretty hard work.

Q. And you woke up many mornings with pains in your legs?

A. No, sir. I went from 131 to 167 pounds, before I got a throat ailment over there, and then I lost weight.

Q. Were you with Mr. Haddon when he reported at Alameda to sign off?

A. We didn't report at Alameda to sign off. We signed off at [71] Barber's Point.

Q. When you arrived at the mainland didn't you have to call at the contractors.

A. They met us on the boat and gave us a check for traveling, and that was all there was to it.

Q. You didn't go to the office to file any statement as to whether you had any complaints or not?

(Testimony of W. A. McFadyen.)

A. Absolutely no.

Q. When you got off the boat did you get off the boat with Mr. Haddon? A. Yes.

Q. Where did you go with him, do you recall?

A. After we got off the boat we went to look for a hotel. We had to go to Oakland, five of us took a taxi to Oakland to a hotel. The next day I went over and got the grips and our boxes and brought them back to Oakland, and so we left that night for Spokane.

Q. Were you with him substantially all the time? A. Absolutely.

Q. Do you recall him going to any office of the contractor to file any statement?

A. Wait a minute—I believe he went out to Alameda. It wasn't a statement on his back, I don't believe. It was over a claim on board and room—which I had received before I left Honolulu. And he went out, I believe and put [72] in a claim for that in Alameda the day we left. I wasn't with him at that time.

Q. Did he discuss making any claim about his injury at that time? A. I don't know.

Q. Do you know whether——

A. No, he didn't. I am absolutely certain he didn't say anything to me about making a claim, but I think now—I may be mistaken on this, but I have an idea Tex went out or was talking about making a claim for board and room for ten days in Oakland that he didn't get and I got before we

(Testimony of W. A. McFadyen.)

went to the Islands, which we were supposed to get. If you didn't holler for it you didn't get it.

Q. Did you discuss with him at any time the advisability of receiving medical attention on the Islands?

A. I don't know whether this should be put on record. The medical attention we got over there was nil. The first doctor we had on the project was under the influence of liquor practically all the time he was there and they let him go. The next doctor that came on the project—this is only hearsay, so far as the statement I am making now is concerned.

Q. I would rather not put it in if you can't testify to it.

A. But I can get people who could testify.

Mr. Koenigsberg: You made the inquiry. Let him testify. [73]

Mr. Lanza: I don't want to hear hearsay.

The Witness: This part is. This particular doctor didn't have a license. I don't know how good a doctor he was or anything else.

Deputy Commissioner: That isn't responsive. He wanted to know whether you talked to Tex about medical aid.

A. No, I don't believe there were. No, I don't believe I advised him or said anything about him going and getting medical attention.

Q. Did he have any trouble with his eyes during this time?

(Testimony of W. A. McFadyen.)

A. He used to complain that he would have to get his glasses changed pretty quick.

Q. Did you ever see him reading anything nights?

A. Not very often. Once in a while he would read the paper but—I don't believe that all the time we were around there that I ever saw Tex read a book.

Q. Did he get a paper every day?

A. We just used to get the paper when we could get hold of it. None were delivered there, but if somebody came in with it we got it.

Q. Did you ever observe him when his eyesight was so bad he couldn't see what he was reading?

A. No, I wouldn't say that I ever noticed whether he could see what he was reading or not. As I say, he didn't read practically anything at all.

[74]

Mr. Lanza: I believe that is all.

Redirect Examination

By Mr. Koenigsberg:

Q. That chap that you say came around inquiring last spring about this accident, did he tell you with what company he was associated?

A. He mentioned the insurance company, but I wouldn't say what one, because I don't recall.

Q. And he asked you something about the injury?

A. He asked me if I could recall about Tex Had-

(Testimony of W. A. McFadyen.)

don being injured or hurt his back over there and I said yes.

Recross Examination

By Mr. Lanza:

Q. Now, Mr. McFadyen, that wasn't last spring, but last December or November?

A. No. No, it wasn't.

Q. Are you sure of that?

A. I will swear to that.

Q. When you speak of spring, what do you mean by spring? What have you in mind?

A. Any time before June.

Q. You think it was before June?

A. I feel certain it was.

Q. Of what year? [75] A. Last year.

Q. Of 1943?

A. Yes. Now, as I remember, all I can remember is where I was working at the time is what I am going by on when it was.

Q. Were you in December or November, 1943, were you in Spokane in December, 1943?

A. Yes, 1943.

Q. You were up there?

A. Up until the 11th of December.

Q. Of 1943? A. Yes.

Q. Last year?

A. Last year. I was out of Spokane from August, I think the 2nd until about the 15th, and I was in there a week and then I was out again for 11 days in November.

Q. You don't know who that individual was?

(Testimony of W. A. McFadyen.)

A. No, I don't. He introduced himself but I wouldn't recognize the man again if I saw him, because, as I say, he came one morning at seven o'clock when I was going to work.

Mr. Lanza: I think that is immaterial anyway. That is all. Mr. Marshall, we would like to have some depositions taken or the hearing continued to take testimony of these other parties that couldn't possibly attend. The foreman, for instance, Mr. Lukehart at Honolulu; Mr. Williams at Los Angeles; the representative of the P. N. A. B. at Oakland; [76] also, a representative at Pearl Harbor; and Mr. Gibbs at Houston, Texas. Could that possibly be done?

Mr. Koenigsberg: We will stipulate that we may have ten days to draw up the interrogatories and serve them, ten days to draw up cross-interrogatories and serve them, and forty days after that for the depositions to be here in the Deputy Commissioner's office.

Mr. Lanza: And if we have any objection to the form of the question we will have to take it up with Mr. Marshall. And is it stipulated that we can forward them on to a notary public directly?

Deputy Commissioner: Yes. The case will be set over then to sixty days from today, which is Saturday, April 8th.

Mr. Haddon will go to Dr. Wycoff's office tomorrow at three for an examination. A copy of the report will go to each one of you.

(Hearing closed) [77]

EMPLOYER'S EXHIBIT A

Howard C. Naffziger, M. D.

O. W. Jones, Jr., M. D.

Howard A. Brown, M D.

384 Post Street

San Francisco, U. S. A.

September 17th, 1943

Liberty Mutual Insurance Company,

Central Tower, 703 Market St.,

San Francisco, California.

Re: Mr. Tex Haddon.

Dear Mr. Chandler:

This patient is at the Franklin Hospital under observation. He entered on September 15th, 1943. The following history was obtained from him. He states that he was attempting to lift some heavy pipe-line, while working in Hawaii and while lifting, he felt something 'snap' in his back and everything went black for a while, but he was not unconscious. He sat down for a little while and then reported the incident to the foreman, and was assigned to a job which did not require him to lift. He noticed weakness in his legs, which has persisted up to several weeks ago. The back pain persisted constantly after the accident, and was especially bad in the morning on arising. He noticed occasional cramping in his calves, especially in the left; this also occurred chiefly in the mornings. He returned to the mainland on December 28th, 1942, with symptoms persisting.

He says that on February 10th, 1943, he developed a severe cold or touch of influenza, which "settled in my back and felt like a knife stuck in the back." Since that time, his symptoms have been worse until the past two weeks, when a little improvement has been noted. In February, 1943, he complained of pain in the right shoulder which radiates down the right arm. He figures that the condition of his left shoulder is associated with his low back trouble—he says it is "like lightning" spread from the back to the shoulder. He has had difficulty in raising the right arm above the head and in rotating it. He says that for a period of six weeks after returning to the mainland he had difficulty with his memory—when I asked him what this was due to in his opinion, he says that "the nerve was out of order." He says that he has also had episodes of chills brought out [78] by the cold, but he recalls no fever; during that time, the "blood often rushed to his head" and on one occasion gave him black eyes.

Family history is not contributory. He has been married for twenty years, has two sons living and well.

Past history: he says that he had "a dose of chancres" in 1918—treated in the Army for a week or ten days. His blood Wasserman was negative. He denies any previous accidents or operations.

Systems: he says he has astigmatism in the left eye.

Examination shows a well developed and nour-

ished male, who is obviously nervous but in no discomfort. He has a normal gait.

Head and neck—negative. Head and neck movements normal.

Cranial nerves were within the limits of normal. The retinal vessels show considerable tortuosity. He has an early arcus senilis on the left.

Mouth—no teeth. Throat—negative.

Lungs—clear.

Heart sounds clear. Blood-pressure 136/70.

Reflexes: all deep and superficial reflexes were equal and hyperactive. There were no abnormal reflexes.

Sensation, deep and superficial—normal throughout the entire body.

The various cerebral and cerebellar lobe tests—normal.

Motor power—normal.

Posture: the spine is straight. Weight-bearing is equal on the two lower extremities. Back movements are performed satisfactorily, he gets his finger-tips eight inches from the floor and at this point he complains of some tightness in the backs of his thighs.

He guards all movements of the right shoulder by [79] tightening his muscles, and he goes through facial contortions, and he performs peculiar movements of the left shoulder when attempting to carry out a simple movement.

A review of the medical file shows that at no time have any of the examiners found any alteration in this man's central or peripheral nervous system,

although some of the examiners have suggested that he has some disturbance in his nervous system.

After obtaining the original history from this patient and then having examined him, and again discussing the history with him, he informs me that he did not see a physician until February, 1943. He informs me that it was either late in May or the beginning of June, 1942 when he had the alleged strain; he continued to work on his job, but rested as much as possible. The contract on which he was working concluded in December, so he returned to the States. He said that he had not intended to return to the Mainland—that he planned to come back in May or June of this year, but came back earlier because of the alleged buckling under him, and pain in the back on stooping. He has not returned to work since arriving on the Mainland.

Discussion: this patient has no positive objective neurological findings. There are no findings at this time which would enable one to make a diagnosis of dislocated nucleus pulposus.

There is nothing to indicate that he has any pressure within his spinal canal. It is to be noted in the above report that, although he says he strained his back some time late in May or early in June, 1942, he did not seek medical advice until February, 1943.

From a neurological standpoint, this patient has

no disability, and I can recommend no further form of investigation or therapy.

Sincerely yours,

O. W. JONES, Jr.

O. W. Jones, Jr., M. D.

Drs. NAFFZIGER, JONES,
BROWN

OWJ/FM [80]

EMPLOYER'S EXHIBIT B

Frederick G. Linde, M. D.

Medico-Dental Building

490 Post Street

San Francisco

September 22, 1943

Liberty Mutual Ins. Co.,
Central Tower,
San Francisco, California.

Re: Tex Haddon

Gentlemen:

On September 16, I examined at your request, at the Franklin Hospital, Mr. Tex Haddon, aged 48, occupation—plumber—with reference to his present condition and its possible relationship to an alleged injury sustained on or about June 1, 1942.

The History given by the patient was to the effect that on that date, while in Hawaiian Islands lifting a heavy object, something “snapped” in his low-back. He noted no pain immediately but “was unable to handle his legs properly.” He con-

tinued with lighter work until December 18, 1942 and did not seek medical advice during this period, although he states that he had some pain in his back during that time and he would note "cramps" in the calves of his legs.

He returned to the mainland on December 28, 1942 and shortly thereafter contracted a respiratory infection which "settled in his back." This was allegedly productive of severe pain. He then consulted a local doctor in Lancaster, Idaho where X-rays were made, and shortly thereafter he was hospitalized for a few days in Boise, Idaho. He states that he has received no treatment for his condition, and has not worked since his return to the mainland. He claims some recent improvement.

About the middle of February 1943, without further injury, he noted the onset of pain in his right shoulder. This is the first time symptoms were ever noted in that area.

Present Complaints consist of "some pain" in his low-back following prolonged weight-bearing and during spinal movement. He claims inability to bend forward to reach his shoes with ease. Pain is not referred into the lower [81] extremities at the present time, and he claims good control of his legs.

He claims pain in the right shoulder at times.

Past History elicited no pertinent information.

Examination—The patient is a well-developed and nourished individual, standing in poor spinal posture. He pointed to the center of the lumbosacral region as the site of his discomfort. Mini-

mal scoliosis was present. He restricted movements of his spine considerably, forward bending being checked with fingertips 14" from the floor. None of these movements, however, were accompanied by any muscle spasm and I gained the impression that there was some element of exaggeration. There was 1½" atrophy of the muscles of the left thigh and calf. Patellar reflexes were equal.

The right shoulder showed some generalized restriction of motion but otherwise the extremity was entirely negative.

X-Rays—Report of early X-Rays showed no evidence of bone pathology.

Discussion—From an orthopedic point of view this patient has no disability whatsoever. He restricted all spinal movements considerably but no muscle spasm accompanied these movements, and I gained the impression that there was a considerable element of exaggeration.

If he has no intraspinal pathology, I believe that there is no incapacitation whatsoever and the patient is capable of working at his usual occupation without harmful effect.

The condition of his shoulder is probably due to a subacromial bursitis which bears no relation to the current trauma.

Yours very truly,

F. G. LINDE

Frederick G. Linde, M. D.

FGL:nh

cc to Dr. O. W. Jones [82]

CERTIFICATE

State of Washington
County of Pierce—ss.

I, Bertha Zimmerman, do hereby certify that I am a qualified and acting court reporter in the State of Washington; that as such reporter I reported in shorthand the above entitled cause and that thereafter I transcribed the same; and that the within and foregoing is a true and correct transcript of the stenographic notes taken by me during the hearing in the above entitled cause.

Dated this 14th day of February, 1944.

BERTHA ZIMMERMAN

Court Reporter in and for the State of Washington,
residing at Tacoma.

[Endorsed]: Filed Sept. 4, 1944. [83]

[Title of Commission and Cause.]

COMPENSATION ORDER
AWARD OF COMPENSATION

A claim for compensation having been filed in the Pacific District, and having been transferred to this, the Fourteenth District, by authority of the Commission, and such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following

FINDINGS OF FACT:

That during the early part of June, 1942, the claimant above named was in the employ of the employer above named within the Pacific District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Act on August 16, 1941, as amended (42 U.S.C., Sec. 1651), to employees of contractors with the United States, and others, and that the liability of the employer for compensation under said Act was insured by Liberty Mutual Insurance Company;

That during the said period of time claimant herein while employed as a plumber and while attempting with other employees to place a long, heavy pipe in an erect position strained his back, causing disability; that thereafter the claimant was given lighter work and continued [84] in such employment until December 17, 1942; that thereafter the claimant because of his injury was wholly disabled and that such disability continued at the time of the hearing in this matter held on February 8, 1944;

That the average annual earnings of the claimant at the time of the said injury amounted to the sum of \$5,668.00;

At the time of the first hearing in this matter the employer and insurance carrier objected to the claim filed herein on the ground that no notice of injury was given the employer within thirty days after the injury, and also on the ground that the

said claim herein was not filed within one year from the date of the injury;

I find that the claimant reported the said injury orally to his sub-foreman, and that he thereafter was given lighter work; that the employer's sub-foreman reported the injury to the general foreman; that the insurance carrier had knowledge of the injury in February, 1943, through an agency in Idaho which handled such cases for the carrier; that such agency arranged for the claimant to go to San Francisco in September, 1943, where he was examined by two different physicians for the insurance carrier; that the claimant filed a formal claim for compensation in the Pacific District on September 3, 1943; that the employer filed a report of the claimed injury on July 23, 1943; that in view of these facts the provisions of Section 30 (f) of the Act serve to toll the period of limitation in Section 12 (a) and that the period of limitation in Section 13 (a) did not begin to run until the report of the employer was filed on July 23, 1943; that the failure of the claimant to serve written notice on the employer is excused because the employer had knowledge of the injury;

That as a result of the said injury the claimant has been wholly disabled from December 18, 1942, to and including January 27, 1944; that such disability continued at the time of the hearing held on February 8, 1944, and he is entitled to 58 weeks' compensation at \$25 per week for such disability and amounting to the sum of \$1,450.00; that Leo M. Koenigsberg, attorney, has rendered legal service to the claimant of the reasonable value of \$175.00

and is entitled to a lien on compensation due claimant therefor.

Upon the foregoing facts the Deputy Commissioner makes the following

AWARD:

That the employer, Contractors, Pacific Naval Air Bases, and the insurance carrier, Liberty Mutual Insurance Company, shall pay compensation to the claimant as follows: \$1,450.00, covering to and including [85] January 27, 1944, less \$175.00 to be deducted therefrom and paid Leo M. Koenigsberg as his attorney; that subsequent to January 27, 1944, the employer and insurance carrier shall pay compensation to the claimant bi-weekly at the rate of \$25.00 per week during the continuance of such disability or the further order of the Deputy Commissioner; that the employer and insurance carrier shall furnish claimant with such medical, surgical and hospital treatment as may be appropriate to the further treatment and cure of his disability.

Given under my hand at Seattle, Washington, this 5th day of June, 1944.

WM. A. MARSHALL

Deputy Commissioner,
Fourteenth Compensation
Commission District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer and the insurance carrier at the last known address of each, as follows:

Tex M. Haddon, 415 Adams Street, Lewiston, Idaho.

Contractors, PNAB, Attention Mr. Brash, PO Box 857, Oakland 4, California.

Liberty Mutual Insurance Co., 703 Market St., San Francisco, California.

Leo M. Koenigsberg, Central Bldg., Seattle 4, Washington.

Joseph J. Lanza, c/o Eggerman, Rosling & Williams, Joseph Vance Bldg., Seattle 1, Washington.

WM. A. MARSHALL

Deputy Commissioner.

Dated June 5, 1944.

WAM:KN

[Endorsed]: Filed Sept. 4, 1944 [86]

CERTIFICATION

I hereby certify that the attached claimant's exhibits Nos. 1, 2, 3, 4, 5, and 6, and the attached employer's exhibits A and B, together with the Interrogatories and Answers by David F. Hart dated March 28, 1944, the Interrogatories and Answers by Arthur E. Lukehardt dated April 28, 1944, the Interrogatories and Answers by Sanford L. Platt dated April 20, 1944 and the Interrogatories and Answers by Cedric L. Brash dated March 21,

84 *Contractors, Pacific Air Bases, et al,*

1944 are a part of the record or proceedings before me in this case.

WM. A. MARSHALL

Deputy Commissioner

Fourteenth Compensation
Commission

Seattle, Washington

August 9, 1944

[Endorsed]: Filed Sep. 4, 1944. [87]

CLAIMANT'S EXHIBIT No. 1

Morrison-Knudsen Company, Inc.

General Contractors

Principal Office

319 Broadway, Boise, Idaho

Carroll F. Zapp

Secretary

April 6, 1943

Nicholas Adjustment Bureau

First National Bank Building

Boise, Idaho

Gentlemen:

Enclosed is letter received at this office from Dr. E. L. White of Lewiston, Idaho, relating to the claim of Tex M. Haddon, presumably injured in May or June, 1942, while employed by Contractors, Pacific Naval Air Bases.

We also hand you herewith the X-ray received

from Dr. White and ask that you communicate direct with Dr. White.

Yours very truly,

CARROLL F. ZAPP

CFZ:vg

Enc.

cc: Dr. E. L. White, Lewiston, Idaho [88]

CLAIMANT'S EXHIBIT No. 2

[Letterhead of Nichols Adjustment Bureau]

April 7, 1943

Dr. E. L. White
White Hospital
Lewiston, Idaho

Re: Tex M. Haddon

Dear Dr. White:

Your letter of April 1 in respect to the injuries of Tex M. Haddon, which letter was addressed to Morrison-Knudsen Company, Boise, Idaho, has been referred by that company to our office with a request that we communicate with you concerning the same.

Our office is usually assigned the job of investigating and checking into these claims. We have received no notice from the insurance company of this man's case. It is possible that it wasn't fully reported while he was on the Islands, which we would assume from the history that you relate concerning your interview with him. If you see

Mr. Haddon within the course of the next day or two, will you ask him to be patient for a few days until we can get some word back from the insurance company, and as soon as we hear from them we will get in touch with you and Mr. Haddon and be able then to advise you more concerning this man's treatment and the status of his claim.

Kindly address further communications in respect to the matter directly to our office until you are advised otherwise.

Yours very truly,

NICHOLS ADJUSTMENT
BUREAU OF IDAHO.

By DAVID F. HART

Attorney & Adjuster.

DFH:J [89]

CLAIMANT'S EXHIBIT No. 3

[Letterhead of Nichols Adjustment Bureau.]

May 29, 1943

Mr. Tex M. Haddon
1734 7th Ave.,
Lewiston, Idaho

Dear Mr. Haddon:

You will recall my visit with you April 25 at Lewiston, regarding your back injury. We have been instructed to see that you are given a thorough examination by an orthopedic specialist and from inquiries we have made would prefer to have that examination made by Dr. Jerome K. Burton of

Boise. Such, however, would require a trip down here by you for that purpose.

We would like to know by return mail, if possible, if such a trip could be made. The bus connections down through Grangeville and New Meadows are fairly good for such a trip. It may be too strenuous a trip from you that way. It would probably be better to arrange to make the trip by train. If you can see your way clear to come to Boise we would, of course, have the company remit payment to you of your expenses in that connection.

Please give us a reply and we are enclosing self-addressed, stamped envelope for your use in that connection. If, however, you know of a good orthopedic specialist in that area, kindly advise us as to whom it is. In the meantime, your accident and injury is being checked on in Honolulu and we should have some word before long concerning the same.

Yours very truly,

NICHOLS ADJUSTMENT

BUREAU OF IDAHO

By DAVID F. HART,

Attorney & Adjuster

DFH:J [90]

CLAIMANT'S EXHIBIT No. 4

[Letterhead of Nichols Adjustment Bureau.]

June 3, 1943

Mr. Tex M. Haddon
415 Adams Street
Lewiston, Idaho

Dear Mr. Haddon:

This will acknowledge receipt of your letter of June 1 regarding proposed trip to Boise. I believe that you should plan on about two full days time here in Boise in the event the doctor requires you to go to the hospital for the purpose of this examination.

It will also probably take two full days travel for you to make the trip here and return.

Kindly advise us when you are leaving and when you expect to arrive in Boise.

Yours very truly,

NICHOLS ADJUSTMENT

BUREAU OF IDAHO

By DAVID F. HART

Attorney & Adjuster

DFH:J [91]

CLAIMANT'S EXHIBIT No. 5

[Letterhead of Nichols Adjustment Bureau.]

July 12, 1943

Mr. Tex M. Haddon
415 Adams Street
Lewiston, Idaho

Dear Mr. Haddon:

We are enclosing herewith Draft No. D61-42546 of the Liberty Mutual Insurance Company, dated July 2, 1943, payable to your order in the amount of \$28.28, which is for reimbursement for your expenses on your trip from Lewiston to Boise and return, for medical examination.

We are not yet in a position to give you any information as to the disposition of your claim for compensation benefits.

The medical reports from the doctors here in Boise have not all been completed, but we will get in touch with you as soon as we have some information of interest.

Very truly yours,

NICHOLS ADJUSTMENT

BUREAU OF IDAHO

By DAVID F. HART,

Attorney & Adjuster

DFH:ff [92]

CLAIMANT'S EXHIBIT No. 6

[Letterhead of Nichols Adjustment Bureau.]

September 3, 1943

Mr. Tex M. Haddon

415 Adams Street

Lewiston, Idaho

Dear Mr. Haddon:

This will acknowledge your letter of August 31st advising that you would endeavor to be in San Francisco the 14th or 15th of September for further examination.

Kindly take this letter with you and contact Mr. Tracy C. Chandler in the claims Department of the Liberty Mutual Insurance Company, 703 Market Street, San Francisco, California. He will then take care of you from that point on.

We are advising the insurance company that you will be in San Francisco not later than September 15th, so kindly make your plans to be there not later than that date.

You can take the matter of your expenses for the trip up with Mr. Chandler after you arrive there.

We note that your address now is 415 Adams Street, to which we are addressing this communication.

Very truly yours,

NICHOLS ADJUSTMENT

BUREAU OF IDAHO

By DAVID F. HART,

Attorney & Adjuster

DFH:DH [93]

[Title of Commission and Cause.]

INTERROGATORIES TO DAVID HART

1. State your name and residence address.

Ans. David F. Hart, 1508 No. 7th St., Boise, Idaho.

2. What is your occupation?

Ans. Attorney at Law, occupied principally with insurance investigations and claims adjustments.

3. By whom are you employed?

Ans. Self. I do and have for some time past managed Nichols Adjustment Bureau of Idaho on a retainer fee basis.

4. Did you ever have occasion to talk to Tex M. Haddon in connection with the above claim?

Ans. Yes.

5. Relate as accurately as possible the dates when and the places where you had occasion to talk to Mr. Haddon with reference to this matter, and the subject of your conversation with him on each occasion.

Ans. First conversation April 25, 1943 at claimant's residence, Lewiston, Idaho. Discussed and took statement of facts; claimant's activities; medical examinations; his employment of attorney and his report of accident to Company and to U.S. Employees' Compensation Commission. Four or five conversations at intervals between June 9 and June 15, 1943, at my office, 1st National Bank Bldg., Boise, Idaho. Discussed his examinations by doctors at Boise; that such examination and pay-

ment of travel expenses not admission of liability and advice that carrier had not then accepted liability on claim. Have no recollection of any discussion about employment of attorneys or filing of claim with U.S. Commissioner.

6. Did you ever lead him to believe that the filing of a formal claim was not necessary, or ever tell him that it was not necessary for him to employ an attorney?

Ans. No. At conversation April 25, 1943, Claimant asked me if it was necessary for him to employ *and* attorney. I told him that was a matter of his own choosing; that I was then in Lewiston, Idaho, on a [101] case being heard by U. S. Commissioner Marshall on a claim involving same employer and carrier, and that that claimant had two attorneys representing him on his case. That a number of other cases I knew of the claimants had employed attorneys; that I knew of a number of cases where the employees did not employ attorneys, but attended the hearings by themselves and presented their own cases to the commissioner and that my observation was the Commissioner was invariably fair and the employees seemed to get along all right in presentation of their cases. That as to employment of an attorney to assist him, that was entirely up to him, Mr. Haddon. I did not tell him not to employ an attorney. I asked him if he had filed a notice of claim & injury with U. S. Employee's Compensation Commission at Honolulu before he left the islands, & as I recall, he said he didn't know whether he did or not, & I replied if he had filed such he would likely hear from the Commissioner in due course.

7. As a matter of fact, was the matter of filing a claim ever discussed with him?

Ans. Yes, but only on the occasion and to the extent related in interrogatory 6 next above.

8. State any other facts that you may know pertaining to this matter not specifically covered above.

Interlineation of what was apparently question #8 made by pen, was not made by this witness, but was there when deposition received.

DAVID HART

United States of America,
District of Idaho,
City of Boise—ss.

I, Dale Hart, a Notary Public in and for the State of Idaho, residing in the City of Boise, Idaho, duly commissioned and sworn, do hereby certify that the witness to the foregoing deposition named David Hart was before examination, by me first duly sworn to testify to the truth, the whole truth and nothing but the truth; that the foregoing interrogatories were then asked the said David Hart, and his answers thereto were then correctly transcribed by me as above set forth; that said deposition [102] was then carefully read by said witness and then subscribed by him in my presence.

Witness my hand and official seal this 28th day of March, 1944.

[Seal] DALE HART

Notary Public in and for the
State of Idaho, residing at
Boise.

Copy Received Date 2/18 1944 Koenigsberg and Sanford, Attorneys for Tex Haddon, Plaintiff-Defendant by c.r. [103]

[Title of Commission and Cause.]

CROSS INTERROGATORIES TO
DAVID HART

1. When you received the letter from Morrison-Knudsen Company, Inc., dated April 6, 1943, did you know that Tex Haddon was making a claim for injuries sustained?

Ans. No. I had never known of or heard of Tex Haddon or any injuries he may have sustained prior to the receipt of the letter.

2. Did you advise Dr. E. L. White under date of April 7, 1943, that Tex Haddon should be patient for a few days and you would advise him "the status of his claim"?

Ans. You apparently refer to a letter bearing my signature from Nichols Adjustment Bureau of Idaho, under date of April 7, 1943, to Dr. E. L. White, White Hospital, Lewiston, Idaho. The written contents of the letter speak for themselves. I did not orally, or otherwise advise Dr. White.

[104]

3. Did you ever advise him the "status of his claim" was such that he should file claim in the deputy commissioner's office?

Ans. No. I never did, of my own knowledge know of the status of claimant's claim in the Dep-

uty Commissioner's Office. My sole obligation was the investigation of the claim for the Surety and I was hardly in a position at any time to afford or give claimant legal advice as to his procedure. I did tell claimant while he was in Boise, Idaho between June 9 and June 15, 1943, that the carrier had not as yet accepted liability on his claim for compensation benefits.

4. Did you visit with the claimant on April 25, 1943?

Ans. Yes, I conversed with him and took his written statement of facts at his home at 1734-7th Ave., Lewiston, Idaho on that date.

5. Did you advise the claimant on April 25, 1943, that it was very seldom an attorney was necessary, as the men were dealt with fairly and squarely?

Ans. No. The substance of my conversation with him relative to employment of an attorney was that that was a matter of his own choosing; that I was then in Lewiston on a case being heard by U. S. Commissioner Marshall, involving same employer & carrier and that that claimant had two attorneys representing him. That a number of other cases I knew of, the claimants had employed attorneys; that I knew of a number of cases where the employees did not employ attorneys but attended the hearings by themselves and presented their own cases to the Commissioner, and that my observation was the Commissioner was invariable fair and the employees seemed to get along all right in presentation of their cases. That as to the employment of

an attorney to assist him, that was entirely up to him. I did not tell him not to employ an attorney.

6. Did you, subsequent to one year after the sustaining of the injury, arrange for a trip to be taken to San Francisco by the claimant, for the purpose of the examination?

Ans. This question is ambiguous to me. After claimant had been examined by Doctors at Boise, Idaho, June 1943. I was advised by Surety that they wanted Mr. Haddon to come to San Francisco for a further medical examination & I simply wrote to Mr. Haddon, probably in August or September of 1943, inquiring as to his making the trip & advising him as to the date and place of the examination. I do not have in my possession the carbon copies of the letters addressed to him in this connection, to accurately refresh my memory.

7. Did you, at the time you arranged for the trip to San Francisco, expect to attempt to take advantage of the claimant's failure to file a claim with the deputy commissioner?

Ans. I cannot answer this question yes or no, as to my mind the question is ambiguous, incompetent, irrelevant and immaterial. I do not concede that I arranged for the trip to San Francisco, I only assisted in those arrangements for this trip. As to my expectations I never at any time expected to, or desired to, or attempted to take advantage of the claimant's failure, if he did fail, to file a claim with the Deputy Commissioner. I did not know whether or not, of my own knowledge, he had filed a claim with the Deputy Commissioner. I had no

authority to take any steps to perfect or to defeat any claim he might have. My job was simply to learn the facts and details and render assistance, as I was from time to time instructed, in having medical examinations made of this claimant. [105]

DAVID HART

United States of America,
District of Idaho,
City of Boise—ss.

I, Dale Hart, a Notary Public in and for the State of Idaho, residing in the City of Boise, duly commissioned and sworn, do hereby certify that the witness to the foregoing deposition named David Hart was, before examination, by me first duly sworn to testify to the truth, the whole truth and nothing but the truth; that the foregoing interrogatories were then asked the said David Hart, and his answers thereto were then correctly transcribed by me as above set forth; that said deposition was then carefully read by said witness and then subscribed by him in my presence.

Witness my hand and official seal, this 28th day of March, 1944.

[Seal] DALE HART

Notary Public in and for the State of Idaho, residing at Boise. [106]

[Title of Commission and Cause.]

INTERROGATORIES TO
ARTHUR E. LUKEHARDT

1. Please state your name and residence address.

Ans. Arthur E. Lukehardt, 89th U. S. Naval Construction Battalion, Camp Parks, Shoemaker, Calif.

2. What is your occupation and the name of your employer?

Ans. Chief Shipfitter, U. S. Naval Reserve.

3. How long have you been so employed?

Ans. About seven or eight months.

4. What particular phase of the construction work at Barbers Point, Honolulu, were you in charge of during the year 1942?

Ans. I was plumbing foreman.

5. Do you remember an employee by the name of Tex Haddon who was employed there as a plumber during 1942?

Ans. I do.

6. Under whose supervision did he work during the last ten months of that year?

Ans. Under mine.

7. Mr. Haddon claims to have received an injury during May or June of 1942 while attempting to lift a piece of vent line in a vertical position. Do you recall his reporting the alleged accident to you?

Ans. No, I can't remember that he reported that alleged accident to me. [107]

8. What is your usual procedure when an employee reports he has been injured on the job?

Ans. Send him to the dispensery.

9. Did Mr. Haddon ever complain to you about his back?

Ans. Well, yes.

10. Did he ever tell you that he attributed his trouble to any particular incident at any particular time?

Ans. No.

11. Do you recall whether or not there was a change in the type of work that he performed after June, 1942, until finishing out his contract in December, 1942?

Ans. There was no change in the type of work he performed.

12. If so, what was the reason?

Ans. See answer to question 11.

13. Did he lose any time from his job during the time that he was under your supervision?

Ans. None, to the best of my knowledge.

ARTHUR E. LUKEHARDT

United States of America

District of Northern, So. Div.

City of Oakland, Calif.—ss.

I, J. Kerwin Rooney, a Notary Public in and for the County of Alameda, residing in the City of Oakland, duly commissioned and sworn, do hereby certify that the witness to the foregoing deposition named Arthur E. Lukehardt was before examination, by me first duly sworn to testify to the truth, the whole truth and nothing but the truth; that the foregoing interrogatories were then

asked the said Arthur E. Lukehardt, and his answers thereto were then correctly transcribed by me as above set forth; that said deposition was then carefully read by said witness and then subscribed by him in my presence.

Witness my hand and official seal this 28th day of April, 1944.

J. KERWIN ROONEY

Notary Public in and for the County of Alameda,
residing at Oakland.

Copy Received. Date 2/18 1944. Koenigsberg & Sanford, Attorneys for Plaintiff Tex Haddon by C. K. [108]

[Title of Commission and Cause.]

INTERROGATORIES TO
S. L. PLATT

1. Please state your name and residence address.

Ans. Sanford L. Platt, 1924 St. Louis Drive,
Honolulu, T. H.

2. What is your occupation and nature of your duties?

Ans. Personnel Director.

3. By whom are you employed?

Ans. Honolulu Rapid Transit Co. Ltd., since February 1, 1944. From December, 1941 until Jan. 31, 1944, I was employed by the Contractors. P.N.A.B. in the same capacity.

4. How long have you been so employed?

Ans. Since Feb. 1, 1944.

5. As personnel manager for Contractors Pacific Naval Air Bases, do you have custody of employees' employment records?

Ans. They were in my custody and are still available for my perusal.

6. Referring to those records, do you find any report of any accident or injury sustained by one Tex Haddon during his employment with your organization?

Ans. No.

7. Do you find any record of any unusual absences from work, either lengthy or intermittent in nature?

Ans. No, Both his work record and his attendance record were exemplary.

SANFORD L. PLATT

Received: Mar. 20, 1944. Honolulu. [109]

United States of America

Territory of Hawaii

City of Honolulu—ss.

I, Maurice I. Takasaki, a Notary Public in and for the Territory of Hawaii, residing in the City of Honolulu, duly commissioned and sworn, do hereby certify that the witness to the foregoing deposition named S. L. Platt was before examination, by me first duly sworn to testify to the truth, the whole truth and nothing but the truth; that the foregoing interrogatories were then asked the said S. L. Platt, and his answers thereto were then correctly transcribed by me as above set forth; that

said deposition was then carefully read by said witness and then subscribed by him in my presence.

Witness my hand and official seal this 20th day of April, 1944.

MAURICE I. TAKASAKI

Notary Public in and for the Territory of Hawaii,
residing at Honolulu.

Notary Public First Judicial Circuit Territory of
Hawaii.

My commission expires June 30, 1945.

Witnessed by Lella L. Whiting.

Copy Received. Date 2/18 1944. Koenigsberg &
Sanford, Attorneys for Pltff Tex Haddon by C. K.

[110]

[Title of Commission and Cause.]

INTERROGATORIES TO
CEDRIC L. BRASH

Q. State your name and residence address.

A. Cedric L. Brash, 736 Lincoln Ave., Alameda, Calif.

Q. What is your occupation and nature of your duties?

A. Manager, Legal Dept., Contractors Pacific Naval Air Bases, Oakland, California.

Q. By whom are you employed?

A. Contractors Pacific Naval Air Bases, 2129 Grove St., Oakland, California.

Q. How long have you been so employed?

A. Since Mar. 6, 1941 continuously.

Q. Are you in charge of the files pertaining to claims filed by employees of Contractors Pacific Naval Air Bases under contract NOY-3550 and NOY-4173?

A. Yes.

Q. Referring to those files, will you please produce and attach to this deposition the originals of any and all claims filed by Tex M. Haddon.

A. Answering this question, I must necessarily preface my reply with the statement that I can vouch only on matters pertaining to Mr. Haddon's file at this office (Oakland, California). There is also a file on the claimant at Pearl Harbor, and in that particular I qualify my answer as follows:

Received: Mar. 25, 1944. District No. 14. [111]

I attach hereto two (2) claim statements filed by Tex M. Haddon at this office in the month of December, 1942. They are dated December 24, 1942, and December 23, 1944 (?). The file shows that he was returned aboard the U. S. Transport U. S. S. Henderson, returning to the mainland through the Port of San Francisco on December 28, 1942. These dates are obviously in error.

Q. Is there anything whatsoever in your file indicating that Mr. Haddon mentioned any alleged injury to your company?

A. I have examined the file thoroughly, particularly on several occasions recently in preparation for the answering of these interrogatories, and I

certify that there is nothing in our personal files indicating or suggesting a complaint or report on the part of Tex M. Haddon that he sustained any injury, traumatic or otherwise, or industrial ailment while in our employ.

Q. Can you give any explanation why two separate statements were filed—one dated December 23, 1942, and the other dated December 24, 1942?

A. Yes. It has been the custom and practice of Contractors to have a personnel representative at shipside to meet all contingents of men returning from our employment on the island jobs, at which time they were accustomed to receiving their final pay-off checks and also at which time each and every man available was furnished with one of our claim forms (identical with Exhibits A and B) with instructions to him that he fill it out completely and that if he had any claim of any nature, he give particulars.

It is my belief that the form dated December 23, 1944 (Exhibit A) was in fact made on December 23, 1942. This statement, it will be noticed, was written in pencil. It will also be noted that Tex M. Haddon apparently had no complaints or claims.

The second claim statement (Exhibit B) is filled in with pen and ink and is dated December 24, 1942 (apparently it should have been December 29, 1942). At that time Tex M. Haddon was claiming underpayment in the amount of \$39.50, representing money held out of his wages for accommodations furnished him while he was standing by

on the mainland awaiting outbound transportation.

This second statement, I believe, was filed at the Alameda Naval Air Station office (our address at that time), but it will be noted that no claim was made referring to any physical injury or ailment or claim for Workmen's Compensation benefits. In this particular it is stated by me that had claimant asserted industrial injury or ailment while on our job, a record would have been made of it and the matter would have been referred to the office of the Liberty Mutual Insurance Company at San Francisco. [112]

CEDRIC L. BRASH

United States of America

District of Northern California

City of Oakland—ss.

I, Carl Appelbaum, a Notary Public in and for the County of Alameda, State of California, residing in the City of Oakland, duly commissioned and sworn, do hereby certify that the witness to the foregoing deposition named Cedric L. Brash was, before examination, by me first duly sworn to testify to the truth, the whole truth and nothing but the truth; that the foregoing interrogatories were then asked and the said Cedric L. Brash, and his answers thereto were then correctly transcribed by me as above set forth; that said deposition was then carefully read by said witness and then subscribed by him in my presence.

Witness my hand and official seal this 21st day of March, 1944.

[Seal]

CARL APPELBAUM

Notary Public in and for the County of Alameda,
State of California, residing at 6140 Contra
Costa Road, Oakland, California. [113]

EXHIBIT A

This Form to be Filled in Completely by all
Returned Men

Contractors
Pacific Naval Air Bases
P. O. Drawer "F"
Alameda, California

Statement

1. Name (Last name) Haddan, (First name)
Tex, (Middle Ini.) M.

2. Social Sec. No. 535-07-9492. Draft Board No.
...., (City) Lewiston, (State) Idaho.

3. Last position as plumber on

4. Date sailed from mainland 1-10-42. Name of
boat Wharton.

5. Date returned on mainland 12-28-42. Name
of boat Henderson.

6. Through what mainland port did you return?
Frisco.

7. Reason for my return to mainland. Finished
cont.

8. My employment contract signed at (City)
Alameda, Calif.

9. Statement of undersigned:

.....
.....

Dated: Alameda, California day of 12-23,
1944.

TEX M. HADDAN

Signature

.....

Witness

Mailing Address: Spokane, Wash. c/o A. Dibble.

If interested in re-employment check: Yes ()

No ()

Note: Give Dates, Places and Names of persons especially familiar with the facts. Use reverse side if space provided hereon is insufficient. [114]

EXHIBIT B

Contractors

Pacific Naval Air Bases

P. O. Drawer "F"

Alameda, California

Statement

1. Name (Last name) Haddon, (First name) Tex, (Middle Ini.) M.

2. Last position as plumber on Barber's Point.

3. Date sailed from mainland 1-10-42. Name of boat Wharton.

4. Date returned on mainland 12/28/42. Name of boat Henderson.

5. Through what mainland port did you return?
Frisco.

6. Reason for my return to mainland Finished
cont.

.....
7. My employment contract signed at (City)
....., Calif.

8. Statement of undersigned:

\$39.50 was held out of my wages for c/a & hotel
bills going out. And my contract was signed on
the 23 and was dated the 24. I'm one day short.

Note: Give Dates, Places and Names of persons
especially familiar with the facts. Use reverse side
if space provided hereon is insufficient.

Dated: Alameda, California 24th day of Dec.,
1942.

/s/ TEX M. HADDON

Signature

.....

Witness

Address: Spokane, Wash.

c/o A. Dibble, R. #8 [115]

CERTIFICATION

Re: Liberty Mutual Insurance Company

vs.

Wm. A. Marshall

C. A. #962

This certifies that the following documents are a

part of the record of the proceedings before me in the above entitled case.

Interrogatories and Answers by Forrest E. Williams dated April 3, 1944.

The report of a Medical Examination made on February 9, 1944, by Dr. H. J. Wyckoff an impartial examining physician, at the request of the Deputy Commissioner.

WM. A. MARSHALL

Deputy Commissioner

Fourteenth Compensation
Commission

Seattle, Washington

August 19, 1944

Endorsed: Filed Sep. 4, 1944. [116]

[Title of Commission and Cause.]

INTERROGATORIES TO
FORREST E. WILLIAMS

1. Please state your name and residence address.

Ans. Forest Edward William, Sr. 1333 W. 42nd Street, Los Angeles, California.

2. What is your present occupation? and name of your employer?

Ans. Plumber, J. L. Krueger Company.

3. What was your occupation and name of employer during 1942?

Ans. General Plumbing Foreman—Pacific Naval Air Bases.

4. What particular phase of the construction work at Barbers Point, Honolulu, were you in charge of during the year 1942?

Ans. Constructing Pacific Naval Air Base. Plumbing and steam fitting supervision.

5. Do you remember an employee by the name of Tex Haddon who was employed there as a plumber during 1942?

Ans. Yes.

6. Under whose supervision did he work during the last ten months of that year?

Ans. Directly under my sub-foreman.

7. Mr. Haddon claims to have received an injury during May or June of 1942 while attempting to lift a piece of vent line in a vertical position. Do you recall his reporting the alleged accident to you?

Ans. I recall sub-foreman reporting the accident to me verbally but could not verify definite time of accident. [117]

8. What is your usual procedure when an employee reports he has been injured on the job?

Ans. Send him to doctor and hospital Emergency hospital on job.

9. Did Mr. Haddon ever complain to you about his back?

Ans. Yes he has various times while I was on the job.

10. Did he ever tell you that he attributed his trouble to any particular incident at any particular time?

Ans. Not that I can recall.

11. Do you recall whether or not there was a change in the type of work that he performed after June, 1942, until finishing out his contract in December, 1942?

Ans. Yes he was given lighter work to do because my instructions was to keep every man on the job.

12. If so, what was the reason?

Ans. On account of injury to back.

13. Did he lose any time from his job during the time that he was under your supervision?

Ans. Not that I can recall.

FORREST E. WILLIAMS

United States of America

District of

City of—ss.

I, Betty Jane Smock, a Notary Public in and for the City of Los Angeles, residing in the City of Los Angeles, duly commissioned and sworn, do hereby certify that the witness to the foregoing deposition named Forrest E. Williams was before examination, by me first duly sworn to testify to the truth, the whole truth and nothing but the truth; that the foregoing interrogatories were then asked the said Forrest E. Williams, and his answers thereto were then correctly transcribed by me as above set forth; that said deposition was then carefully read by said witness and then subscribed by him in my presence.

Witness my hand and official seal this 3rd day of April, 1944.

BETTY JANE SMOCK

Notary Public in and for the County of Los Angeles, residing at Los Angeles.

My Commission expires July 8, 1947.

Copy received. Date 2/18 1944.

KOENIGSBERG & SANFORD,
Attorneys for Plaintiff by c.k.

(Letterhead of H. J. Wyckoff)

February 9, 1944

Tex M. Haddon,—Report, Special Orthopedic Examination. DB-P-1-8269. United States Employees Compensation Commission.

History: This man states that in June, 1942, while raising or holding some heavy pipe above his head, he felt a snapping sensation in the lower back. He said that things sort of went black for a moment and he put his hand on his back. He states that he seemed to have some disturbance of control of the legs so after reporting to the office he was put on lighter work. Following this he had severe pain in the back and sort of cramping sensations in both legs, more severe in the left. He states that soon after this he returned to the States and after arriving here he developed a rather severe cold and with this he had a severe knife like pain in the lower back.

Present Complaints: He states that at the pres-

ent time the condition is somewhat improved but he still has some pain in the lower back and a feeling of tightening of the muscles in the lower extremities. He states that he has a pumping sensation in the ankles, knees and hips. He states that following the original trouble the pain seemed to be referred down the left thigh and left leg as far as the foot. He also had pain which he felt was referred up in the region of the right shoulder and right upper arm.

Past History: He states that he has never had any previous injuries and no previous back trouble. He has never had any operations.

Examination: This man is 49 years of age. 5' 11" in height and weighs about 165#. He can bend forward to within 12" of the floor. Backward bending is markedly limited, at least 50%, lateral bending is limited about 50%, in each direction in the lumbar region and rotation is limited about 25%, in each direction, in the lumbar region. Motion of the cervical and dorsal spine seems to be fairly free. He has good motion of the left upper extremity. He has good motion of the right elbow, wrist and fingers. The right shoulder is markedly limited, can be abducted about 60 degrees, rotation is limited about 50% in each direction, with a complaint of pain in the region of the right shoulder joint. He complains of tenderness over the lumbo-sacral region and out over the superior gluteal region on either side. There is a dulling of sensation over the outer side of the left leg and foot, sensation otherwise seems to be normal.

The abdominal, cremasteric and patellar reflexes are equal and active, the right Achilles reflex is present, the left is entirely absent. On measurement about the calf regions, the left is $\frac{1}{4}$ " less than the right. Measurements about the lower thigh, the left is 1" less than the right, over the midthigh the left is $\frac{3}{8}$ " less than the right. He has intermittent spasm of the lower back muscles but does not have a fixed protective spasm of these muscles.

The eyes appear normal, pupils reacting to light and accommodation. All of the teeth have been extracted and he is wearing upper and lower plates. The tonsils are small. Measurements about the arms and forearms are practically the same on both sides. This man is normally right handed.

Received: Feb. 15, 1944. District No. 14. [119]

This man shows a relaxation of the right wrist, with considerable forward and backward motion at the wrist joint or through the carpal joints, which he states was due to an old injury during the last world war. He states there was no injury to the shoulder at that time as far as he knows, although there may have been an injury to the right shoulder at that time.

X-Rays: Of the right shoulder show no definite pathology in the region of this shoulder, except possibly a slight narrowing of the joint space and some slight bone atrophy of the bones about this joint. X-Rays of the lumbosacral spine show no pathology in the lateral view, except a slight narrowing of the intervertebral space between the

4th and 5th lumbar vertebrae, in the lateral view. There seems to be a very slight lipping of the 5th lumbar vertebra.

Conclusions: The clinical findings and history in this man's case are very typical of a displaced intervertebral disc between the 5th lumbar vertebra and the sacrum, on the left side. There is also some pathology in the region of the right shoulder which is probably in the nature of an arthritis involving this shoulder joint. I think it is possible that the lesion which he has at the present time occurred at the time of his accident, of June, 1942. The condition of the right shoulder is probably an inflammatory condition and does not seem to be definitely connected with his injury.

I would recommend an operation for this man's back, exploring the region between the lumbar vertebrae and the sacrum on the left side. This is a case which probably will not need to be fused but this should be determined at the time of operation.

H. J. WYCKOFF.

HJW:E

In the District Court of the United States
for the Western District of Washington
Northern Division

No. 962

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation and Contractors, Pacific Naval
Air Bases, an Association,

Libellants,

vs.

WILLIAM A. MARSHALL, Deputy Commis-
sioner of United States Employees' Compensa-
tion Commission for the Fourteenth Compensa-
tion District,

Respondent.

MOTION TO DISMISS

Comes now William A . Marshall, Deputy Com-
missioner of the United States Employees Com-
pensation Commission for the Fourteenth Compensa-
tion District, defendant in the above entitled
cause, and respectfully moves the Court for an or-
der dismissing the bill of complaint for mandatory
injunction herein.

This motion is based upon the files and records
in the above entitled cause.

J. CHARLES DENNIS

United States Attorney

HERBERT O'HARE

Asst. United States Attorney

Copy Received Sept. 6, 1944. Eggerman, Rosling
& Williams, Attorneys for Libellants.

[Endorsed]: Filed Sep. 7, 1944. [121]

District Court of the United States
for the Western District of Washington
Northern Division

No. 962

LIBERTY MUTUAL INSURANCE CO., et al,
Plaintiff,

vs.

WILLIAM A. MARSHALL and TEX M. HAD-
DON,

Defendants.

MOTION TO INTERVENE

Comse now the defendant, Tex M. Haddon and respectfully moves the court to enter an order herein permitting said defendant to intervene on the ground and for the reason in the event petitioner is successful in the above-cause the judgment will adversely affect the undersigned.

This motion is based upon the files and records herein, and the affidavit of L. M. Koenigsberg hereto attached.

KOENIGSBERG & SANFORD

Attorneys for Defendants

Received a copy of the within motion this 12 day
of Sep. 1944.

J. CHARLES DENNIS

Attorney for Defts.

Copy Received Sep. 14, 1944.

EGGERMAN, ROSLING &

WILLIAMS

Attys. for Pltf. & Dft.

[Endorsed]: Filed Sep. 14, 1944. [122]

[Title of District Court and Cause.]

AFFIDAVIT OF L. M. KOENIGSBERG

State of Washington,
County of King—ss.

L. M. Koenigsberg, being first duly sworn upon oath, deposes and says: That he is one of the attorneys for Tex M. Haddon in the above-entitled cause; that Tex M. Haddon is one of the real parties in interest; that in the event the plaintiff obtained a relief the petitioner of Tex M. Haddon will be adversely affected, and therefore desires to be permitted to intervene in the above-entitled cause.

L. M. KOENIGSBERG

Subscribed and sworn to before me this 12 day of August, 1944.

[Seal]

P. O. D. VEDOVA

Notary Public in and for the State of Washington,
residing at Seattle.

Received a copy of the within Affidavit this 12 day of Sept. 1944.

J. CHARLES DENNIS

Attorney for Defts.

Copy Received Sep. 14, 1944.

EGGERMAN, ROSLING &
WILLIAMS

Attys for Pltf. & Deft.

[Endorsed]: Filed Sep. 14, 1944. [123]

In the District Court of the United States
for the Western District of Washington
Northern Division

No. 962

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation, and CONTRACTORS, PA-
CIFIC NAVAL AIR BASES, an Association,
Libellants,

v.

WM. A. MARSHALL, Deputy Commissioner of
United States Employees' Compensation Com-
mission for the Fourteenth Compensation Dis-
trict,

Respondent,

TEX HADDON,

Intervenor.

STIPULATION THAT TRANSCRIPT OF PRO-
CEEDINGS BE DEEMED A PART OF
THE RECORD

It is stipulated by and between J. Charles Dennis
United States Attorney for the Western District
of Washington represening the respondent, Egger-
man & Rosling & William representing the libel-
lants, and Koenigsberg & Sanford representing the
intervenor, that the transcript of the testimony of
the hearing held before the respondent Wm. A. Mar-
shall, and all the proceedings may be incorporated
in and deemed a part of the record in this cause.

Dated this . . . day of September, 1944.

J. CHARLES DENNIS

By HERBERT O'HARE

Assistant U. S. Attorney

EGGERMAN & ROSLING &

WILLIAMS

By JOSEPH J. LANZA

KOENIGSBERG & SANFORD

By L. M. KOENIGSBERG

Copy Received Sep. 14, 1944.

EGGERMAN, ROSLING &

WILLIAMS

Attys for Pltf. & Deft.

[Endorsed]: Filed Sep. 14, 1944. [124]

[Title of District Court and Cause.]

ANSWER

Comes Now Tex Haddon, Intervenor in the above-entitled cause, and answering Bill of Complaint for Mandatory Injunction admits, denies and alleges:

I.

Admits Paragraphs I to VII, inclusive.

2.

Answering Paragraph VIII, admits that thereafter on June 5, 1944, respondent made and entered his Compensation Order and Award of Compensation, a copy of which is attached to the complaint

marked "Exhibit A"; denies each and every other material allegation contained in Paragraph VIII.

3.

Admits Paragraph IX.

4.

Has not sufficient information upon which to form a belief as to the matter contained in Paragraph X and therefore denies the same. [125]

5.

Denies Paragraph XI and XII.

Further Answering Libellants' Bill of Complaint and by Way of Affirmative Defense, Intervenor alleges:

1.

That by stipulation heretofore made, a transcript of the testimony taken at the hearing before the Deputy Commissioner and the exhibits introduced therein may be deemed part of the record herein; that the Intervenor does by reference incorporate the same herein as though fully set forth herein.

2.

That upon motion heretofore made to duly dismiss the Libellants' Complaint, Libellants submitted a brief in which they have specifically waived Subdivisions 1 and 2 of Paragraph VII of their Complaint; and in addition, in Libellants' Complaint there are no specific allegations as to wherein the Deputy Commissioner's findings in reference

to Subdivisions 1 and 2 alleged in Paragraph VII of the Complaint were not in accordance with law.

3.

That Intervenor does by reference incorporate herein the transcript of all testimony taken in the above-entitled matter before the Deputy Commissioner and all the exhibits introduced.

4.

That the sum of \$150.00 is a reasonable sum to be allowed Intervenor as attorneys' fees in this cause of action.

Wherefore, having fully answered Libellants' Complaint, Intervenor prays that the Complaint be dismissed, and that he be awarded the sum of \$150.00 as attorneys' fees in this cause of action and his costs and disbursements incurred herein, and [126] such other relief as to the court shall seem meet.

KOENIGSBERG & SANFORD
Attorneys for Intervenor

State of Washington,
County of King—ss.

L. M. Koenigsberg, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the Intervenor in the above entitled cause of action; that he has read the foregoing Answer, knows the contents thereof, and believes the same to be true.

L. M. KOENIGSBERG

Subscribed and sworn to before me this 5th day of October, 1944.

P. O. D. VEDOVA

Notary Public in and for the State of Washington,
residing at Seattle.

Copy Recvd. 10/5/44.

JOSEPH J. LANZA

Attny for Libellants.

Received a copy of the within Answer this 5 day of Oct. 1944.

J. CHARLES DENNIS

U. S. Attorney

Attorney for Respondent.

[Endorsed]: Filed Oct. 5, 1944. [127]

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO DISMISS

This matter came on regularly for hearing before the undersigned, one of the Judges of the above entitled court, on Monday, October 9, 1944, at 10:00 o'clock a.m., was continued to 4:00 o'clock p.m. on said date when argument was heard, which argument was concluded on October 10, 1944, libellants appearing by J. Lanza of Eggerman, Rosling & Williams, their attorneys, respondent appearing by his attorney, Herbert O'Hare, Assistant United States Attorney, Assistant to J. Charles Dennis, United States Attorney, and intervenor appearing

by his attorney, Leo M. Koenigsberg, and it having been stipulated by and between counsel for all the parties that the transcript of all the testimony taken before the respondent and all the exhibits introduced at the hearings before respondent be considered part of the files and records in this cause and that the court be permitted to peruse all of said records for the purpose of making his determination and ruling as to motion to dismiss made by counsel for the [128] respondent and intervenor, and the court having perused all of said records, and having listened to argument by counsel for libellants and the intervenor, Tex Haddon, and being fully advised in the premises,

Now, therefore, it is

Ordered, Adjudged and Decreed that the motion to dismiss be and is hereby granted.

It Is Further Ordered, Adjudged and Decreed that legal services rendered to the intervenor, Tex Haddon, by Leo M. Keonigsberg are of the reasonable value of \$150.00 and libellants will pay said sum of money to said Leo M. Koenigsberg, which payment shall constitute a lien on the compensation now or hereafter to become due to said intervenor, Tex Haddon, and said libellants shall be permitted to satisfy said lien by deducting \$15.00 from each bi-weekly payment now due or hereafter to become due, making said deductions until such time as the full sum of \$150.00 paid to Leo M. Koenigsberg has been fully satisfied. To all of which libellants except and their exception is allowed.

Done in Open Court this 16th day of October,
1944.

JOHN C. BOWEN,
Judge.

Presented by:

L. M. KOENIGSBERG
Attorney for Intervenor.

O. K. as to form:

JOSEPH J. LANZA
Attorney for Libellants

Approved:

HERBERT O'HARE
Asst. United States Attorney

By L. M. KOENIGSBERG

Approved:

HERBERT O'HARE

[Endorsed]: Filed Oct. 16, 1944. [129]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
APPEALS

Notice Is Hereby Given that Liberty Mutual Insurance Company, a corporation, and Contractors, Pacific Naval Air Bases, an association, libellants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order grant-

ing motion to dismiss entered in this action on October 16, 1944.

JOSEPH J. LANZA
EGGERMAN, ROSLING &
WILLIAMS

Attorneys for Libellants.

Address: 918 Vance Building, Seattle, Washington.

Received a copy of the within Notice of Appeal this 13th day of Jan. 1945.

J. CHARLES DENNIS
Attorney for Respondent.

[Endorsed]: Filed Jan. 13, 1945. [130]

[Title of District Court and Cause.]

COST BOND ON APPEAL

United States Fidelity and Guaranty Company
Baltimore, Maryland

Know All Men by These Presents: That we, Liberty Mutual Insurance Company, a corporation, and Contractors, Pacific Naval Air Bases, an Association, as Principals, and United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, Authorized to do the business of surety in the State of Washington, as surety, acknowledge ourselves to be jointly indebted to Wm. A. Marshall, Deputy Commissioner of the United States Employees Compensation Commission for

the 14th Compensation District, Respondent, and Tex Haddon, intervenor, in the above entitled cause, in the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, conditioned that, whereas, on the 16th day of October, 1944, in the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in that court wherein Liberty Mutual Insurance Company, a corporation, and Contractors, Pacific Naval Air Bases, an Association, are Libellants, and Wm. A. Marshall, Deputy Commissioner of the United States Employees Compensation Commission for the 14th Compensation District, was Respondent, and Tex Haddon was Intervenor, an order was entered granting motion to dismiss, and the said Libelants having filed in the office of the Clerk of the said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California.

Now, Therefore, the condition of the above obligation is such, that if the said Liberty Mutual Insurance Company, a corporation, and Contractors, Pacific Naval Air Bases, an Association, shall prosecute its appeal to effect and answer all costs, if the appeal is dismissed or by judgment affirmed, or all such costs as the appellate court may award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

Sealed with our seals and dated this 12th day of January, 1945.

LIBERTY MUTUAL INSURANCE
COMPANY, and CONTRACTORS,
PACIFIC NAVAL AIR BASES, an
Association.

By JOSEPH J. LANZA

one of their attorneys

[Seal] UNITED STATES FIDELITY AND
GUARANTY COMPANY

By JOHN C. W. COLLISTER

Attorney in fact. [131]

State of Washington,
County of King—ss.

On the 12th day of January, 1945, before me personally appeared John C. McCollister to me known to be the Attorney-in-fact of the corporation that executed the within and foregoing instrument as surety, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] J. C. BEERON

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Jan. 13, 1945. [132]

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORDS,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN THE RECORD ON AP-
PEAL

Pursuant to Rule 75(f) of the Rules of Civil Procedure, it is hereby stipulated between Appellants, through their attorneys Joseph J. Lanza and Eggerman, Rosling & Williams, and Appellees, Wm. A. Marshall, through J. Chas. Dennis, United States District Attorney, and Herbert O'Hare, Assistant United States District Attorney, and Tex Haddon, through his attorney L. M. Koenigsberg, that the following disignations of the parts of the records, proceedings and evidence in the above entitled cause shall constitute the record on appeal therein, this designation to take the place of and be in lieu of Appellants' designation of record heretefore filed on January 26, 1945:

1. Bill of complaint for mandatory injunction filed July 5, 1944, and Exhibit "A" thereto attached.
2. Certification of record of Deputy Commissioner Wm. A. Marshall, filed September 4, 1944.

[133]

3. Transcript of testimony taken at hearing held by Deputy Commissioner Wm. A. Marshall on December 29, 1943.

4. Transcript of testimony taken at hearing held by Deputy Commission Wm. A. Marshall on February 8, 1944.

5. Original commensation order filed by Wm. A. Marshall on June 15, 1944.

6. Certification of record of Wm. A. Marshall filed September 4, 1944.

7. Claimant's Exhibits 1 - 6, inclusive, consisting of the following:

a. Letter from Morrison-Knudsen to Nichols Adjustment Bureau, dated April 6, 1943;

b. Letter from Hart to Dr. White, dated April 7, 1943;

c. Letter from Hart to Haddon, dated May 29, 1943;

d. Letter from Hart to Haddon, dated June 3, 1943;

e. Letter from Hart to Haddon, dated July 12, 1943;

f. Letter from Hart to Haddon, dated September 3, 1943.

8. Employer's Exhibits "A" and "B" consisting of the following:

a. Report of Dr. O. W. Jones, Jr., dated September 17, 1943;

b. Report of Dr. Frederick G. Linde, dated September 22, 1943.

9. Interrogatories and cross-interrogatories and answers thereto of David Hart.

10. Interrogatories and answers thereto of Arthur Lukehardt.

11. Interrogatories and answers thereto of Sanford Platt.

12. Interrogatories and answers thereto of Cedric L. Brash, including Exhibits "A" and "B" referred to therein.

13. Certification of record of Deputy Commissioner Marshall, filed September 4, 1944.

14. Interrogatories and answers thereto of Forrest E. [134] Williams.

15. Report of H. J. Wyckoff, M.D., of medical examination made on February 9, 1944.

16. Motion to dismiss filed September 7, 1944.

17. Motion to intervene filed September 14, 1944.

18. Stipulation that transcript of proceedings be deemed a part of the record filed September 14, 1944.

19. Answer to Tex Haddon filed October 5, 1944.

20. Order granting motion to dismiss filed October 16, 1944.

21. Notice of appeal filed January 13, 1945.

22. Cost bond on appeal filed January 13, 1945.

23. Stipulation designating parts of the record, proceedings and evidence in the record on appeal.

24. Appellants' statement of points.

25. Certificate of Clerk to transcript of record on appeal.

Dated this 16th day of February, 1945.

J. J. LANZA

EGGERMAN, ROSLING &

WILLIAMS

Attorneys for Appellants.

J. CHAS. DENNIS

U. S. District Attorney

HERBERT O'HARE

Asst. U. S. District Attorney
Attorneys for Wm. A. Marshall, Deputy Commissioner

L. M. KOENIGSBERG

Attorney for Tex Haddon.

[Endorsed]: Filed Feb. 17, 1945. [135]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL.

The following is a concise statement of the points on which Appellants intend to rely on appeal:

1. That the United States District Court for the Western District of Washington, Northern Division, erred in entering its order granting Defendants motion to dismiss.

2. That said District Court erred in refusing to annul, reverse, vacate and set aside by mandatory injunction or otherwise, compensation order and award of compensation made by Deputy Commissioner William A. Marshall on June 5, 1944

3. That there is no substantial evidence in the record to support the findings of the Deputy Commissioner that the Claimant's disability was the result of the accident complained of, and that such disability continued at the time of the hearing held on February 8, 1944.

4. That the Deputy Commissioner, in making the

findings as above, ignored proper medical evidence submitted therein. [136]

5. That the finding of the Deputy Commissioner as above is a mere assumption based upon possibility and conjecture instead of substantial proof, and is therefore not in accordance with law.

EGGERMAN ROSLING & WILLIAMS

JOSEPH J. LANZA

Attorneys for Appellants

Copy received Date 1/26 1945.

KOENIGSBERG & SANFORD

Attorneys for Plaintiff Defendant

By B. TAYLOR

Received a copy of the within Statement of Points this 26 day of Jan. 1945.

J. CHARLES DENNIS

U. S. Attorney for Wm. A.
Marshall Dep Commr.

[Endorsed]: Filed Jan. 26, 1945. [137]

[Title of District Court and Cause.]

STIPULATION FOR ORDER EXTENDING
THE TIME FOR FILING THE RECORD
ON APPEAL AND DOCKETING THE ACTION.

Pursuant to Rule 73 (g) of the Rules of Civil Procedure, it is hereby stipulated between Appel-

lants and Appellees through their respective attorneys of record, that the District Court may extend the time for filing the record on appeal with the appellate court and docketing the action to the 10th day of March, 1945.

Dated this 21st day of February, 1945.

JOSEPH J. LANZA
EGGERMAN, ROSLING &
WILLIAMS

Attorneys for Appellants
J. CHARLES DENNIS

U.S. District Attorney
ALLAN POMEROY

Asst. U.S. District Attorney
Attorneys for Wm. A. Marshall

L. M. KOENIGSBERG
Attorney for Tex Haddon

[Endorsed]: Filed Feb. 21, 1945. [137a]

[Title of District Court and Cause.]

**ORDER ON STIPULATION EXTENDING
TIME FOR FILING THE RECORD ON AP-
PEAL AND DOCKETING THE ACTION.**

Pursuant to stipulation filed herein and by virtue of the authority granted to the District Court by Rule 73 (g) of the Rules of Civil Procedure, now therefore

It Is Hereby Ordered that the time for filing the

record on appeal with the appellate court and docketing the action in that court, is hereby extended to the 10th day of March, 1945.

Done In Open Court this 21st day of February, 1945.

JOHN C. BOWEN

District Judge

Presented by:

HENRY KASTNER

JOSEPH J. LANZA

of counsel for Libelants

OK

L. M. KOENIGSBERG

OK

ALLAN POMEROY

[Endorsed]: Filed Feb. 21, 1945 [137b]

[Title of District Court and Cause.]

APPELLANTS' SUPPLEMENTAL DESIGNA-
TION OF RECORD TO BE CONTAINED
IN THE RECORD ON APPEAL.

Come now the Appellants above named and herewith designate the additional portion of the record to be contained in the record on appeal:

1. Stipulation and Order extending time for filing record and docketing case in the appellate court.
2. Appellants' supplemental designation of record.

Dated this 21st day of February, 1945.

JOSEPH J. LANZA
EGGERMAN, ROSLING &
WILLIAMS
Attorneys for Appellants

Copy received Date Feb. 21, 1945.

KOENIGSBERG & SANFORD
Attorneys for Plaintiff-
Defendant

By B. TAYLOR
HERBERT O'HARE
EAS

[Endorsed]: Filed Feb. 21, 1945. [137c]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF TRANSCRIPT
OF RECORD ON APPEAL

United States of America

Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered 1 to 137c, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District

Court at Seattle and that the same constitute the record on appeal from the order of dismissal of said United States District Court for the Western District of Washington to the United States Circuit of Appeals for the Ninth Circuit. [138]

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's Fees (Act of February 11, 1925) for making record, certificate or return.

87 folios at 15c	\$13.05
265 folios at 5s	13.25
Appeal fee (Section 5 of Act)	5.00
Certificate of Clerk to Transcript of Record .....	.50

Total \$13.80

I further certify that the foregoing fees have been paid by the attorney for the appellants.

In witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 22d day of February, 1945.

[Seal]

MILLARD P. THOMAS,

Clerk

By BONITA WATKINS

Deputy Clerk [139]

[Endorsed]: No. 10992. United States Circuit Court of Appeals for the Ninth Circuit. Contractors, Pacific Naval Air Bases, an association, and Liberty Mutual Insurance Company, a corporation, Appellants, vs. Wm. A. Marshall, Deputy Commissioner of the United States Employees Compensation Commission for the 14th Compensation District, and Tex Haddon, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed March 1, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10992

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation, and CONTRACTORS PACIFIC
NAVAL AIR BASES, an association,

Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of the
United States Employees' Compensation Com-
mission for the 14th Compensation District, and
TEX HADDON,

Respondents.

APPELLANTS' STATEMENT OF POINTS ON
WHICH THEY INTEND TO RELY ON
APPEAL AND DESIGNATION OF THE
RECORD DEEMED NECESSARY FOR
THE CONSIDERATION THEREOF

Come now Appellants and, pursuant to Sub-
division 6, Rule 19, of the Rules of the United States
Circuit Court of Appeals for the Ninth Circuit,
herewith adopt the statement of points filed in the
District Court upon which Appellants intend to rely
on appeal, and herewith designate the entire tran-
script of record as prepared and certified by the
Clerk of the District Court, to be printed for pur-
poses of this appeal.

Dated this 23 day of February, 1945.

JOSEPH J. LANZA
EGGERMAN, ROSLING &
WILLIAMS

Attorneys for Appellants

Service of the foregoing by receipt of true copy thereof is hereby acknowledged this 23 day of February, 1945.

J. CHARLES DENNIS

U. S. District Attorney

HERBERT O'HARE

Asst. U.S. District Attorney

Attorneys for Wm. A. Marshall, Deputy Commissioner

L. M. KOENIGSBERG

Attorney for Tex Haddon

[Endorsed]: Filed Mar. 3, 1945. Paul P. O'Brien,
Clerk.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES,
an Association, and LIBERTY MUTUAL
INSURANCE COMPANY, a Corporation,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner
of the United States Employees' Com-
pensation Commission for the Four-
teenth District, and TEX HADDON,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

EGGERMAN, ROSLING & WILLIAMS,
D. G. EGGERMAN,
EDW. L. ROSLING,
DEWITT WILLIAMS,
JOSEPH J. LANZA,

Attorneys for Appellants.

918 Vance Building,
Seattle 1, Washington.

FILED

JUN 30 1945

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES,
an Association, and LIBERTY MUTUAL
INSURANCE COMPANY, a Corporation,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner
of the United States Employees' Com-
pensation Commission for the Four-
teenth District, and TEX HADDON,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE
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EGGERMAN, ROSLING & WILLIAMS,
D. G. EGGERMAN,
EDW. L. ROSLING,
DEWITT WILLIAMS,
JOSEPH J. LANZA,

Attorneys for Appellants.

918 Vance Building,
Seattle 1, Washington.

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**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CONTRACTORS, PACIFIC NAVAL AIR BASES,
an Association, and LIBERTY MUTUAL
INSURANCE COMPANY, a Corporation,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner
of the United States Employees' Com-
pensation Commission for the Four-
teenth District, and TEX HADDON,
Appellees.

No. 10992

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from the final decree of the District Court granting Appellees' motion for dismissal of Appellants' Bill of Complaint for Mandatory Injunction, which was filed to set aside the compensation order and award of compensation made by Wm. A. Marshall, Deputy Commissioner of the United States Employees' Compensation Commission for the 14th Compensation District, respecting the claim of Tex Haddon involved herein.

JURISDICTION

District Court

The jurisdiction of the District Court is believed to be sustained by Subdivision (b) of Section 21 of the Longshoremen's and Harborworkers' Compensation Act (Public Law No. 803—69th Congress) as amended (33 U.S.C.A. Sec. 921(b)) which reads in part as follows:

“If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, etc.”

and under Subsection (b) of Section 3 of the Defense Base Act (Public Law No. 208—77th Congress) (42 U.S.C.A. Sec. 1653(b)), reading in part as follows:

“Judicial proceedings provided under Sections 18 and 21 of the Longshoremen's and Harborworkers' Compensation Act in respect to a compensation order made pursuant to this act shall be instituted in the United States District Court of the judicial district wherein is located the office of the Deputy Commissioner whose compensation order is involved if this office is located in a judicial district,” etc.

Circuit Court

The jurisdiction of this court is believed to be sustained by Judicial Code Sec. 128(a) (28 U.S.C.A. Sec. 225(a)), reading in part as follows:

“The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions—

“First. In the District Courts in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title.”

The decree appealed from was entered on October 16, 1944 (Tr. 123). Within three months thereafter, pursuant to Sec. 240-8(c) of the Judicial Code (28 U.S.C.A. Sec. 230), to-wit, on January 13, 1945, Notice of Appeal was served and filed in accordance with Rule 73(a) and (b) of the Rules of Civil Procedure (Tr. 125). Cost Bond on appeal in the sum of \$250.00 was filed with the Notice of Appeal on January 13, 1945, pursuant to Rule 73(c) of the Rules of Civil Procedure (Tr. 126). Stipulation designating the record, proceedings and evidence to be contained in the record on appeal was signed on February 16, 1945, and filed with the Clerk of the District Court on February 17, 1945, pursuant to Rule 75(f) of the Rules of Civil Procedure (Tr. 129). Statement of points on which Appellants intend to rely on appeal was served and filed on January 26, 1945, pursuant to Rule 75(d) of the Rules of Civil Procedure (Tr. 132). Order pursuant to stipulation, extending the time for filing the record on appeal and docketing the action to March 10, 1945, was entered by the District Court on February 21, 1945, pursuant to Rule 73(g) of the Rules of Civil Procedure (Tr. 133, 134). Appellants' statement of points on which they intend to rely on appeal and designation of the record deemed necessary for the consideration thereof was served on February 23, 1945, and filed with the Clerk of the Circuit Court on March 3, 1945, pursuant

to Subdivision 6, Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit (Tr. 139).

STATEMENT OF THE CASE

The question involved is whether there is any *substantial evidence* in the record to support the award of compensation entered by the Deputy Commissioner, based upon the finding that claimant's disability was the result of an accident that occurred in June, 1942.

The following is a brief summary of the evidence:

On January 22 or 23, 1942, claimant, Tex Haddon, commenced working as a plumber in the Hawaiian Islands (Tr. 33). During the last part of May or the first part of June, 1942, claimant testified that while engaged with two other employees in attempting to stand up a long section of heavy pipe, he slipped and felt something snap down in his back; that when this happened everything turned black for a second and he felt sick and "pretty hot" (Tr. 34). After sitting down a moment, he said he reported the accident to Andrew Lukehardt, the plumbing foreman (Tr. 35). This, however, was denied by Mr. Lukehardt (Tr. 98). Claimant decided, however, to wait a day or two before having an X-ray taken, as he did not want to lose any time from his work. About thirty minutes after the alleged accident, he resumed working on the prefabricating bench (Tr. 35), in which no heavy lifting was involved. (The plumbing foreman, however, testified there was no change in his type of work, Tr. 99). Previous to this alleged occurrence, his general health was good, and his back

and legs had never bothered him. Afterwards, he would wake up with a sore back and suffer cramps in his legs (Tr. 37). His back would also get sore if he was on his feet too long. This condition persisted from that day on (Tr. 38). He continued to work, however, until December 17, 1942 (Tr. 16) when he left for the United States (Tr. 38). He lost no time from his work on account of any alleged disability (Tr. 99) and both his work record and his attendance record were exemplary (Tr. 101).

W. A. McFayden, a roommate of claimant, testified that claimant had always seemed "peppy and full of life" and was a hard worker until along the latter part of June, when he started to complain about his back and legs (Tr. 59). After that, he said claimant laid in his bunk in the evening, never leaving the camp (Tr. 60), and that he didn't seem to have the pep that he had before (Tr. 62).

After finishing his employment contract, claimant returned to the United States on December 28, 1942 (Tr. 43, 103). Upon arrival, he was, according to the customary practice of the employer, handed a claim statement by a company representative, with instructions to fill it out completely if he had any claim of any nature (Tr. 104). This he signed without asserting any claim therein (Tr. 104, 106). The next day, he signed another statement, claiming underpayment in the amount of \$39.50, but again asserting no claim on account of the alleged injury (Tr. 104, 107).

From San Francisco, he proceeded to his home in

Lewiston, Idaho, arriving there on February 9, 1943, after making several stops in Spokane, Auburn, Kent and Seattle (Tr. 50). There, he contracted a cold and a severe pain settled in his back (Tr. 42, 43). As a result, he consulted Dr. E. L. White, who had X-rays taken of his back on March 8, 1943. Dr. White told him he thought his "fifth lumbar" was damaged (Tr. 51) but did not tell him that his condition was due to the alleged injury (Tr. 56). Dr. White merely told him that there was nothing he could do, and referred him to claimant's employer. The employer, in turn, referred the matter for investigation to the Nichols Adjustment Bureau, at Boise, Idaho (Tr. 52).

The Nichols Adjustment Bureau, in turn, arranged an examination of claimant in Boise by doctors there (Tr. 26) and later by doctors in San Francisco, after claimant expressed a willingness to go there for further examination (Tr. 30).

Claimant was placed under observation at Franklin Hospital in San Francisco on December 15, 1943, and examined there by Drs. O. W. Jones, Jr., a neurologist, and Fred C. Linde, an orthopedist. Dr. Jones found no positive objective neurological findings, and stated that, from a neurological standpoint, the patient had no disability (Tr. 72). Dr. Linde also reached the same conclusion from an orthopedic point of view (Tr. 76).

A short time before the San Francisco trip, to-wit, on August 28, 1943, claimant for the first time signed a claim for disability (Tr. 19), which was first filed in the Pacific District of the United States

Employees' Compensation Commission in September, 1943, and, in turn, received by Wm. A. Marshall, as Deputy Commissioner of the Fourteenth Compensation District on September 13, 1943 (Tr. 18).

The Deputy Commissioner held two hearings in this matter. One on December 29, 1943 (Tr. 13) and the second on February 8, 1944 (Tr. 21). Further examination of claimant was made by Dr. H. J. Wyckoff on February 9, 1944, at the request of claimant, and in his report, Dr. Wyckoff states that X-rays of the lumbosacral spine showed no pathology in the lateral view, except a slight narrowing of the intervertebral space between the fourth and fifth lumbar vertebrae, but that there seemed to be a very slight lipping of the fifth lumbar vertebra. He concluded that the clinical findings and history in this case were typical of a displaced intervertebral disc between the fifth lumbar vertebra and the sacrum on the left side, and that "I think it is possible that the lesion which he has at the present time occurred at the time of his accident, of June, 1942." He thereupon recommended an exploratory operation of the region between the lumbar vertebrae and the sacrum on the left side (Tr. 112).

On June 5, 1944, the Deputy Commissioner entered his compensation order and award of compensation in favor of claimant, based upon a finding that claimant was wholly disabled after December 17, 1942, as the result of the injury sustained in June, 1942 (Tr. 79).

The employer and insurance carrier, feeling aggrieved by said order, filed complaint for mandatory

injunction on July 5, 1944 (Tr. 2). In due course, Appellees filed a motion to dismiss (Tr. 116), and the matter came on for hearing before the District Court, terminating in the entry of an order on October 16, 1944, granting the said motion (Tr. 123). This appeal followed.

SPECIFICATION OF ERRORS

1. There is no substantial evidence in the record to support the finding of the Deputy Commissioner that the claimant's disability was the result of the accident complained of, and that such disability continued at the time of the hearing held on February 8, 1944.

2. The Deputy Commissioner, in making the finding as above, ignored proper medical evidence submitted therein.

3. The finding of the Deputy Commissioner as above is a mere assumption, based upon possibility and conjecture instead of substantial proof, and is therefore not in accordance with law.

4. The United States District Court for the Western District of Washington, Northern Division, erred in entering its order granting Appellees' motion to dismiss, and in refusing to annul, reverse, vacate and set aside by mandatory injunction or otherwise, the said compensation order and award of compensation made by Deputy Commissioner on June 5, 1944.

ARGUMENT

Inasmuch as the various specifications of error are so inter-related that the argument upon one necessarily involves a discussion on each of the others, and in order, therefore, that this brief will not be unduly encumbered with repetitious arguments, Appellants will treat all the assigned errors in one argument, a brief summary of which is as follows:

1. Announcement of general legal principles.
2. The record fails to disclose that an "injury" was sustained.
3. The findings are not supported by any medical testimony.
4. The "other evidence" is insufficient to support a finding of causal relationship.
5. A review of the Federal cases re right of Deputy Commissioner to disregard medical testimony.
6. The necessity of medical testimony to establish causal relationship.

I.

Announcement of General Legal Principles

Appellants frankly concede at the outset the following well established principles of compensation law relied upon by Appellees in their argument below:

1. That the Longshoremen's Act is to be liberally construed in favor of the injured employee or his dependent family.
2. That findings of fact of the Deputy Commissioner, *if supported by substantial evidence*, are final and not subject to judicial review.
3. Logical deductions and inferences drawn by the Deputy Commissioner from the evidence are to be

taken as established facts, and are not judicially reviewable.

4. The court cannot weigh the evidence.

Equally well established, however, are the following legal principles upon which Appellants rely:

1. In order for the findings to be "in accordance with law," they must be "supported by evidence" (*Crowell v. Benson*, 285 U. S. 22, 46, 76 L. ed. 598, 610), which means supported by "substantial evidence." *Steamship Terminal Operating Corp. v. Schwartz*, 140 F.(2d) 7, 8 (2d Cir. 1944); *Consolidated Edison Co. v. National Labor Rel. Bd.*, 305 U. S. 197, 229, 83 L. ed. 126, 140; *National Labor Rel. Bd. v. Columbian E. & S. Co.*, 306 U. S. 292, 299, 83 L. ed. 660, 665.

2. "Substantial evidence" is more than a mere scintilla, and must do more than create a suspicion of the facts to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co. v. National Labor Rel. Bd.*, 305 U. S. 197, 229, 83 L. ed. 126, 140; *National Labor Rel. Bd. v. Columbian E. & S. Co.*, 306 U. S. 292, 299, 83 L. ed. 660, 665.

3. While the courts liberally construe the act, the causal connection between the work of the employee and the injury in the course of employment must be proven.

"Despite its liberality, the act does not allow compensation unless the injury flows from the employment as effect from cause."

Trudenich v. Marshall, 34 F. Supp. 486, 488 (D.C. Wash. 1940).

4. The mere fact that an injury is contemporaneous or co-incident with the employment is not a sufficient basis for an award. *Ayers v. Hoage*, 63 F.(2d) 364, 365 (C.C.A.—D.C. 1933).

5. Before he can make a valid award, the trier must determine that there is a direct causal connection between the injury, whether it be the result of accident or disease, and the employment. *Ayers v. Hoage*, 63 F.(2d) 364, 365 (C.C.A.—D.C. 1933); *Trudenich v. Marshall*, 34 F. Supp. 486 (D.C. Wash. 1940); *Hoage v. Liberty Mut. Ins. Co.*, 78 F.(2d) 874 (C.C.A.—D.C. 1935).

6. If the deputy ignores proper evidence presented, it is an error of law; and if prejudice results, his order is not in accordance with law, and the court will give relief. *Grant v. Marshall*, 56 F.(2d) 654 (D.C. Wash. 1931).

7. The statutory presumption that the claim comes within the provisions of the law merely furnishes a basis for proof and not a substitute therefor. It does not shift the burden of proof from the claimant to prove by substantial evidence that the injury arose out of and in the course of his employment. *Indemnity Ins. Co. of No. America v. Hoage*, 58 F.(2d) 1074 (C.C.A.—D.C. 1932).

With these legal principles in mind, let us now look at the record to see if there is any substantial evidence which supports the award allowing compensation.

II.

The Record Fails to Disclose that an "injury" was sustained

First of all, it is significant to note as bearing upon the question whether claimant ever sustained an injury in May or June, 1942, that he testified at the first hearing held on December 29, 1943, as follows:

Question: "When did you report your case to anybody representing the employer as being a disability resulting from an injury?"

Answer: "Well, no one officially. I talked it over with many of my friends over there that worked with me, but really I did not think up until the time I got the cold and it settled in there and simply got me down that I was actually injured." (Tr. 16)

At the hearing held on February 8, 1944, claimant testified in answer to the question why he did not apply for medical treatment or examination after the alleged accident occurred:

"Because this back injury just gradually come on, and I thought it was on account of the absence of minerals or vitamins or my discomfortable bed that was causing a lot of my ill feelings.

* * *

"I figured that — they claim there is no minerals on the Islands at all, you see, and I thought probably it was due to the absence of minerals and I even got the idea it might be my kidneys, so I took some Doan's kidney pills and I rubbed my back with rubbing alcohol and my legs; and I took vitamin tablets. I kept thinking—I couldn't get it through my head that I could actually be hurt. That is the truth of it. I couldn't think

anything like that could render me unfit as it actually did." (Tr. 41, 42)

Secondly, it is significant that the employer's records are devoid of any report of an accident or of any injury sustained by claimant. Thus, Cedric L. Brash, manager of the Legal Department of the employer at Oakland, California, testified as follows:

"I have examined the file thoroughly, particularly on several occasions recently in preparation for the answering of these interrogatories, and I certify that there is nothing in our personal files indicating or suggesting a complaint or report on the part of Tex. M. Haddon that he sustained any injury, traumatic or otherwise, or industrial ailment while in our employ." (Tr. 103, 104)

Likewise, S. L. Platt, who was the personnel director for the employer from December, 1941, until January 31, 1944, testified that from a perusal of the employee's employment records, he failed to find any report of any accident or injury sustained by claimant during his employment, and that both his work record and his attendance record were exemplary (Tr. 101). Certainly, such a record could not have been established by an "injured" employee to the extent that claimant contends.

Another circumstance tending to show that no specific injury occurred is the failure of claimant to assert any injury in his two statements which were furnished him upon his arrival on the mainland (Tr. 106, 107). While they are both obviously misdated, since it is admitted that claimant did not arrive on

the mainland until December 28, 1942, it appears therefrom that no claim was made in writing on either of the two occasions presented to Mr. Haddon, that he sustained any physical injury during his year's employment. It will be noted that in both statements he gave as his reason for returning to the mainland, that he had finished his contract—*not that he was physically unable to work any longer.*

III.

The Findings Are Not Supported by Any Medical Testimony

The medical reports filed herein are likewise devoid of any evidence upon which a finding of disability can be sustained. Thus, Dr. Linde, an orthopedist, and Dr. Jones, a neuro-surgeon, who made a thorough examination of claimant in San Francisco in September, 1943, each concluded that claimant was not suffering from any disability. Dr. Wyckoff, who made a special orthopedic examination of February 9, 1944, was unable to find any objective symptom except a slight narrowing of the intervertebral space between the fourth and fifth lumbar vertebrae, and a slight lipping of the fifth lumbar vertebrae. He found some pathology in the region of the right shoulder, which he concluded was in the nature of an arthritis involving this shoulder joint, having no causal relationship with the alleged injury. The only shred of medical testimony which favors claimant is Dr. Wyckoff's statement that "I think it is possible that the lesion which he has at the present time, occurred at the time of his accident of

June, 1942." Such testimony amounts to nothing more than speculation and conjecture, which the courts have uniformly and repeatedly held is not sufficient upon which to sustain a finding of casual relationship.

The numerous cases so holding are collated in an annotation in 135 A.L.R., beginning at page 517, where the author summarizes the rule in the following language:

"It appears to be well settled that medical testimony as to the possibility of a causal relation between a given accident or injury and the subsequent death or impaired physical or mental condition of the person injured is not sufficient, standing alone, to establish such relation. By testimony as to possibility is meant testimony in which the witness asserts that the accident or injury 'might have,' 'may have,' or 'could have' caused or 'possibly did' cause the subsequent physical condition or death or that a given physical condition (or death) 'might have,' 'may have,' or 'could have' resulted or 'possibly did' result from a previous accident or injury — testimony, that is, which is confined to words indicating the possibility or chance of the existence of the causal relation in question, and does not include words indicating the probability or likelihood of its existence, see, as supporting the foregoing proposition the following decisions."

Among the numerous cases cited in support of the foregoing proposition is the case of *Frank Marra Co. v. Norton*, 56 F.(2d) 246 (D.C. Penn. 1931), where the court said, at page 247:

"It is true that when 'expert testimony is re-

lied on to show the connection between an alleged cause and a certain result, it is not enough for the doctors to say simply that the ailment in question might have resulted from the assigned cause, or that the one could have brought about the other; they must go further and testify at least that, taking into consideration all the attending data, it is their professional opinion the result in question most probably came from the cause alleged."

It is true the court in that case held that there was "other evidence" to sustain the finding of the Deputy Commissioner, but the decision at least recognizes that the medical testimony as to "possibility" was not sufficient upon which to predicate a finding of causal relationship.

Likewise, in *Burton v. Holden & M. Lbr. Co.*, 20 A.(2d) 99, 135 A.L.R. 512 (Vt. 1941), to which the foregoing annotation is appended, the court held that a doctor's opinion that the infection *could have been a possible* contributing cause of cerebral thrombosis and subsequent death, was insufficient as a basis upon which to predicate causal relationship, since the conclusion of the doctor was entirely speculative.

That this statement of Dr. Wyckoff is pure conjecture and speculation is apparent on its face, when it is remembered that he did not examine claimant until approximately twenty months after the time the claimant alleges that he was injured. Certainly, Dr. Wyckoff was in no position to give any direct testimony that the slight narrowing of the intervertebral space between the fourth and fifth lumbar ver-

tebrae and the slight lipping of the fifth lumbar vertebra was received on the occasion in question.

A recent decision of the Circuit Court of Appeals, 5th Circuit, in *Standard Acc. Ins. Co. v. Nicholas*, 146 F.(2d) 376, decided December 30, 1944, emphasizes this point. The question in that case was whether or not the paralyzed condition of the claimant was attributable to an injury received in the course of his employment, or to the disease poliomyelitis, as the same related to compensability or its lack under the Texas Workmen's Compensation Act.

The injury sustained by the claimant in that case is very similar to the one involved in the case at bar. There, the claimant testified that while he was assisting in loading rafters on a truck, one of the rafters careened him over to one side as he was holding it over his head, hurting him between the shoulders. As in the instant case, it will be noted that he was not struck by the rafter nor anything else, nor did he receive any kind of a blow. After ten or fifteen minutes he went back to work, finishing out the rest of the day, slept well that night, worked all of the next day, sleeping well that night, and was up and around town the second day after the accident, which was Sunday. He did not sleep well, however, that night, nor did he return to work Monday, but around ten o'clock Monday morning was stricken with a paralysis. He testified that he had a pain between his shoulders during the entire time, however.

The insurance carrier contended that plaintiff's injury was caused by poliomyelitis, and not by an

injury occurring in the course of plaintiff's employment. Plaintiff's two experts, while conceding that plaintiff's symptoms in some degree were always present in poliomyelitis, attributed his condition to paralysis caused by a traumatic, compressed fracture of certain vertebrae, and partial rupture and hemorrhage of the spinal cord.

The lower court overruled the defendant's motion for a directed verdict and findings of the jury were for the plaintiff.

The court, in holding that upon the basis of this evidence, the lower court should have sustained the motion of the defendant for a directed verdict, pointed out that since there was no direct evidence in the record that the fracture was received on the occasion in question, the testimony of plaintiff's experts, who did not examine plaintiff until some eleven months after the injury, was without "probative force." Said the court, at page 378:

"There is no proof, but only an assumption or hypothesis by the medical expert of the appellee, that the appellee received fractured vertebrae and puncture of the spinal cord on the occasion in question, and under the decisions of the Texas court he cannot use a mere hypothesis as the basis of another hypothesis.

"It was approximately 11 months after the time the plaintiff was unloading the rafters before either of plaintiff's physicians saw or examined plaintiff, and neither of them could have given any direct testimony that the alleged fracture was received on the occasion in question.

"At best, the evidence as to any fracture of

the vertebrae, or any puncture of the plaintiff's spinal column, or that the plaintiff's condition was the result of the hypothetical fracture and puncture, is entirely circumstantial, and does not meet the test prescribed by this court * * *."

IV.

The "Other Evidence" Is Insufficient to Support a Finding of Causal Relationship

It follows from the foregoing authorities that the medical testimony, at least, does not lend support to the Deputy Commissioner's finding. There is left, then, only the testimony of claimant himself as to his subjective symptoms and of W. A. McFadyen as to claimant's chronic complaints and his observation of claimant's actions. It should be remembered that McFadyen was not present at the time of the alleged occurrence, and was therefore in no position to give any testimony as to causal relationship. As for the claimant himself, he admitted that he did not think that he had been hurt, but thought his condition was due to the lack of minerals in the drinking water. He completed his entire contract of employment, working approximately 7 months after the alleged occurrence took place, and arrived on the Mainland in December, 1942, without asserting any claim based on his physical condition, although he had ample opportunity to do so. It was not until he contracted the cold after returning to the mainland, which settled in his back, that he concluded that his condition must have been due to an accident that he had sustained some 8 or 9 months previous thereto. For the Deputy Commissioner to make a

finding of causal relationship upon such evidence, wholly unsupported by medical testimony, is, or clearly should be held, not to be "in accordance with law."

V.

A Review of the Federal Cases re. Right of Deputy Commissioner to Disregard Medical Testimony

The court below, in expressing its oral opinion, said that in a case like this one, the Deputy Commissioner was entitled to ignore the medical evidence against the award and base it solely on this other non-medical evidence. This theory was first announced in certain District Court cases which had to do with questions involving merely the percentage of disability. Thus, the first case announcing this doctrine is *Joyce v. United States Deputy Commissioner*, 33 F. (2d) 218 (D.C. Me. 1929). That this decision is clearly not applicable to the instant case can be seen readily from the following portion of the court's opinion:

"It is claimed that here that situation exists because as alleged, there was no evidence to support the order of the Deputy Commissioner; but that can hardly be said to be the case where the injured man and his *maimed hand* were examined by the Deputy Commissioner, who evidently considered that the testimony of two doctors, called by the plaintiff, as to the percentage of disability due to the loss of parts of two fingers, should be modified by the facts observed by him supplemented by the application of the rigid rules of compensation specified in the Act and covering every particular finger."
(Our italics)

The next decision in point of time on this proposition is *Jarka Corporation v. Norton*, 56 F.(2d) 287 (D.C. Pa. 1930). There claimant was injured by being struck on the back by a falling object, resulting in the fracturing of a bone in the spinal column. He was unable to return to work until more than three months thereafter, at which time he worked one day, and was then compelled to lay off for another two months. From then on until the middle of the fourth month thereafter, he worked with a fair degree of regularity, but was unable to do certain kinds of work and suffered considerable pain. At that time, he gave up entirely. The doctor called by the Deputy Commissioner stated that the pain experienced by the claimant could be due to the fracture. The court merely said:

“I am unwilling to hold that a claimant, in order to establish a case for compensation, must produce expert medical testimony to substantiate his claim, *where it is proved that he sustained a fracture of the back and is now unable to work, and where the disability not having existed before the injury, has been more or less continuous since the injury.*” (Italics ours)

In that case, therefore, it will be seen that the injury was of a traumatic nature, produced by a falling object. Furthermore, there was proof that the back had been actually fractured as a result of the accident. There was a period of three months immediately following the accident when the injured party was wholly unable to work. None of these elements are present in the case at bar.

The next case in point of time, and the first one from our local District Court, is *Zurich General Acc. & Ins. Co. v. Marshall*, 42 F.(2d) 1010 (D. C. Wash. 1930). There, as in the preceding case, claimant suffered a traumatic injury as the result of a falling object. Doctors testified that the claimant was totally incapacitated from following the duties of a longshoreman or any like occupation where heavy lifting was required, and that the disability of his right arm was perhaps fifty per cent to sixty-five per cent. In that case, it will be seen that there was actual proof of a fracture and the medical testimony clearly supported the Commissioner's findings.

The fourth case in point of time is *Booth v. Monahan*, 56 F.(2d) 168 (D. C. Me. 1930). This also was a percentage disability case. The court merely held that a Deputy Commissioner had the right to disregard the percentage figures given by any one of the doctors and to use his own judgment as to the amount of impairment of the claimant's leg considered with reference to his occupation.

The fifth case is *Baltimore & Ohio R. Co. v. Clark*, 56 F.(2d) 212 (D. C. Md. 1932). There the employee died two days after an attack of heat prostration. The testimony of a number of doctors was heard. One of them actually testified to causal connection. Hence, as observed by the court itself, the Deputy Commissioner's conclusion was not "devoid of support by the medical testimony." Furthermore, the court said:

"In the present case, the admitted condition

surrounding the work in which the deceased was engaged on the first day, in contrast with those on the second day, the time and character of his first illness and of its recurrence, are alone sufficient to make reasonable the inference that the deceased was prostrated while working in the bunkers on the first day, and that this prostration or its effects recurred, due to exertion on the following day."

The sixth case is *Liberty Stevedoring Co., Inc. v. Cardillo*, 18 F. Supp. 729 (D.C. N. Y. 1937). A traumatic injury to the foot was involved there. The claimant had been hospitalized for almost one year. Thereafter, he had received medical treatment at the hospital clinic for about one and a half years. After being readmitted to the hospital, an amputation of his leg was performed. Claimant had already received considerable amounts as compensation for his disability. The testimony of two doctors supported the finding, and one doctor disagreed. The court merely said:

"The Deputy Commissioner was not found to accept the opinion of Dr. Bartley (objecting doctor), but had the right to rely upon his own observation and other evidence."

Another case announcing that doctrine is *Southern S.S. Co. v. Norton*, 41 F. Supp. 108 (D.C. Penn. 1941). There, the employee was struck on the face over his eye by a cargo net. He testified that his vision was impaired after the accident, although it had not been impaired prior thereto. One of the doctors who examined him at the instance of the Deputy Commissioner, reported that there was a partially

dislocated lens in his eye which, with other conditions present, was sufficient to account for the diminution in vision. Another impartial physician rendered his report, in which it was stated that there was a dislocated lens in the left eye, and that "this man's condition may be due to the accident or it may have existed prior to this injury." Several doctors, testifying for the employer, stated that, while there was some physical injury to the eye, due to the accident, the latter caused no impairment of sight.

On the basis of this evidence, the court held that there was sufficient competent evidence to support a finding by the Commissioner to the effect that the diminution in vision did result from the accident.

In the first place, it will be noted that there was involved a traumatic injury, the objective symptoms of which were seen by all of the doctors. They all agreed that injury was present, the only dispute being whether such physical injury caused impairment of sight. Secondly, this was a case where a layman in ordinary affairs of life, could infer cause from effect, for obviously if the testimony of the employee was believed that his left eye and vision was normal prior to the accident, but that he could not see as well after the accident, and doctors corroborated the presence of actual physical injury to the eye, medical testimony positively establishing a causal relation was obviously unnecessary. In the case at bar, however, there is no traumatic injury involved. No doctor ever examined the claimant until many months thereafter, and therefore could give no direct testi-

mony as to the objective results of the alleged accident. Furthermore, the disability did not manifest itself until practically eight or nine months thereafter, except for leg cramps and backaches which the claimant attributed to his kidneys and the lack of vitamins in the drinking water.

Another case that may be cited in support of the doctrine is *Ryan Stevedoring Co. v. Norton*, 50 F. Supp. 221 (D. C. Penn. 1943). The opinion does not disclose the nature of the injury or the disability involved. However, it appears that claimant was injured in April, 1939, and was disabled intermittently to August 4, 1940, and received compensation for this disability. In August, 1941, he filed a claim for recurrent disability, and an additional award was made for a period of about four weeks. Thereafter, there was a further recurrence, and compensation was voluntarily paid to February 12, 1942. Later, another order was entered allowing compensation for a period terminating April 2, 1942. On August 28, 1942, another award allowed compensation to the claimant for a three-week period beginning August 6. Thus, it will be seen that the physical disability of claimant had been adjudicated on numerous occasions, and is so utterly unlike the present case on its facts, that it merits little or no consideration.

VI.

The Necessity of Medical Testimony to Establish Causal Relationship

On the contrary, the rule is firmly established in the state courts, that where the disability for

which compensation is sought under a Workmen's Compensation Act, is of such character as to require determination of its nature, cause, and extent to be made by professional persons, proof thereof must be made by testimony of such witnesses. *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 118 P.(2d) 334 (Cal. 1941); *Cutler v. Bergen, etc. Co.*, 25 Atl.(2d) 75 (Pa. 1942); *Burton v. Holden, etc. Lbr. Co.*, 20 Atl.(2d) 99 (Vt. 1941).

The rule as to the necessity of medical testimony in such cases is well stated in 32 C.J.S. Sec. 569d, page 399, as follows:

"As a general rule the weight to be given the opinion of a medical or other expert witness as to the cause or effect of a happening, condition, situation, or circumstance is for the jury or other trier of the facts, and the opinion is not conclusive, *but when the subject under consideration is one within the knowledge of experts only, and there is no reason for the exercise of common knowledge, undisputed expert testimony which is based on scientific processes, methods, or knowledge is to be accepted as conclusive by the trier of the facts*, provided the credibility of the witness or witnesses is accepted. An expert opinion as to cause or effect may constitute substantial evidence, sufficient to support a finding in accordance with the opinion. Expert evidence as to causal connection is not necessary where facts are testified to by lay witnesses with sufficient clearness that laymen in ordinary affairs of life can infer cause from effect, *but, where an injury is of such a character as to require skilled and professional men to determine the cause thereof, the question is one of science,*

which must be proved by the testimony of skilled and professional men." (Our italics)

There certainly can be no question here but that the cause of claimant's alleged disability involves a determination of physical processes which are "obscure and abstruse" concerning which a layman can have no well-founded knowledge, and can do no more than indulge in mere speculation.

Surely, all of the attendant facts are not sufficient to indicate to the *lay mind* that the only fair inference to be drawn was that the alleged accident in May or June 1942, proximately contributed to the disability beginning after December 18, 1942. The medical evidence certainly does not support the findings of the Deputy Commissioner, and the other evidence invites only a trip into the realm of speculation and conjecture as to the pathological cause of the disability complained of.

As said by the court in *National Labor Relations Board v. Thompson Products Inc.*, 97 F.(2d) 13 (6th Cir.) at page 15:

"The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power."

If the Deputy Commissioner is permitted to ignore the opinions of medical experts in situations such as presented in the case at bar, that "dividing line" vanishes into the thin air, for the employer and insurance carrier have no other way to protect themselves from claims based on chronic ailments to which most men in adult life are heir.

CONCLUSION

It is respectfully submitted that the findings of the Deputy Commissioner are based purely on conjecture and speculation, wholly unsupported by medical proof, and are therefore "not in accordance with law." The compensation order of the Deputy Commissioner should therefore be annulled, and the judgment of the District Court should be reversed.

Respectfully submitted,

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Appellees.

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NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is an appeal from an order of the District Court for the Western District of Washington, Northern Division, Honorable John C. Bowen, District Judge, dismissing the petition of Contractors, PNAB, for a mandatory injunction and to set aside the compensation order filed June 5, 1944, by Deputy Commissioner William A. Marshall, one of the appellees herein, by which he awarded compensation to Tex M. Haddon for disabilities resulting from injuries sustained in June 1942, while employed by Contrac-

tors, PNAB, in the Territory of Hawaii. The other appellant, Liberty Mutual Insurance Company, was the insurance carrier of the compensation liability of Contractors, PNAB, hereinafter called the employer. The compensation order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424 (33 U.S.C. 901 *et seq.*), as made applicable to persons employed at certain defense base areas and other places by the Act of August 16, 1941, 55 Stat. 622 (42 U.S.C. 1651-1654).

In June 1942, Haddon, while employed as a plumber and while attempting with other employees to place a long heavy pipe in an erect position, strained his back. He immediately reported the injury to his foreman, who in turn told the general foreman and the latter ordered that claimant be assigned to lighter work. Until his return to the United States in December 1942, Haddon did lighter work involving no lifting. But during all the time his back continued to trouble him although he continued to work.

After his return to the United States, Haddon's back still continued to trouble him and he consulted a Dr. White. The latter wrote to the employer on April 1, 1943, enclosing X-ray records of Haddon's back. The employer referred the letter to the Nichols

Adjustment Bureau, the insurance company's representative, who acknowledged it on April 7, 1943, and stated that it would advise the doctor with reference to treatments and the status of the claim as soon as it heard from the insurance company. On May 29, 1943, the Nichols Adjustment Bureau stated that it had been instructed to the effect that Haddon be given a thorough examination and asking if he could come to Boise, Idaho. Haddon went to Boise and entered a hospital for examination, where he remained about a week. Later, in September 1943, at the request of the Nichols Adjustment Bureau, Haddon went to San Francisco for further examination.

On July 23, 1943, the employer filed a report of injury with the deputy commissioner pursuant to section 30 of the Act (33 U.S.C. 930), and on September 3, 1943, Haddon filed his claim for compensation. The employer and carrier controverted the claim upon the grounds that Haddon (1) failed to give notice of injury within 30 days as required by section 12 of the Act; (2) failed to file his claim within one year after the injury as required by section 13 of the Act; and (3) did not sustain any injuries as alleged, or resulting disabilities therefrom (R. 14). Hearings were held before the deputy commissioner on December 29, 1943, and February 8, 1944, at

which both sides offered evidence with respect to the issues controverted. Upon the evidence adduced before him, the deputy commissioner, on June 5, 1944, issued the compensation order complained of (R. 8), whereby he awarded compensation to Haddon.

The employer and carrier thereupon instituted proceedings in the court below to review the compensation order pursuant to the provisions of section 21 (b) of the Longshoremen's Act (33 U.S.C. 921 (b)). The complaint filed (R. 2-7) did not raise the issues whether Haddon failed to give notice, and file his claim within the time prescribed by the Act, nor the issue whether Haddon sustained injuries as he alleged. The complaint asserted only two grounds (Para. VIII, R. 5): (1) that there was no substantial evidence to support the finding that "because of said injury claimant was wholly disabled, and that such disability continued at the time of the hearing held on February 8, 1944"; and (2) that there was no substantial evidence to support the finding as to the amount of Haddon's earnings.

A motion to dismiss the complaint was filed on behalf of the deputy commissioner. The case came on for hearing before the District Judge, who by an order entered October 16, 1944, granted the motion

and dismissed the complaint. The present appeal by the employer and its insurance carrier was accordingly taken.

APPELLANTS' CONTENTION

In the present case the evidence is uncontradicted that the employee sustained an injury to his back while working and was immediately given lighter work, and that from that time he suffered continuous pain and discomfort in his back and legs; that the pain in his back is at the particular spot where he felt the snap in his back at the time of the injury. His fellow employees and superiors testified that the employee was a good worker and in full vitality before the injury and that after the injury he continually complained of his back and legs and would retire to his bunk after work, following his evening meal.

Appellants appear to contend, however, that in order to support an award for disability, opinion by a medical expert must be positive that the disability for which the award is made is causally related to the injury sustained (Appellants' Br. 14 and 25). Appellants apparently concede that causal relationship may sometimes be established by "other evidence", but deny that in the instant case such "other

evidence" is sufficient (Appellants' Br. 19). This contention disregards the evidence of the employee, Haddon, and of his fellow employees and superiors who testified to the injury and its immediate and continued effects. Appellants urge that the only "other evidence" which may be relied upon to support a finding of causal relationship must be such as "to indicate to the *lay mind* that the only fair inference to be drawn was that the alleged accident in May or June 1942, proximately contributed to the disability" (Appellants' Br. 27). Appellants cite no authority which so holds and we know of none. On the contrary, it has been repeatedly held that where the evidence permits of conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed by the courts. Finally, Appellants deny the established rule in Longshoremen's cases that medical opinion may be disregarded.

ARGUMENT

I

THE FINDING OF THE DEPUTY COMMISSIONER THAT CLAIMANT WAS DISABLED AS THE RESULT OF HIS INJURY IS SUPPORTED BY EVIDENCE, AND BEING THUS SUPPORTED IS FINAL AND CONCLUSIVE.

A. The Principles of Law Support the Deputy Commissioner's Action

Appellants' contention comes in substance to this assertion: that once conflict of medical testimony is involved, the courts may review the inferences drawn by the deputy commissioner from the evidence and, unless the inferences he has drawn are in the court's opinion "the only fair inferences" (Appellant's Br. 27), may reweigh the evidence and substitute its own views for those of the deputy commissioner. This is, however, precisely what the decided cases have held the courts may not do.

The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family.¹ It provides as to any claim thereunder

¹ *Baltimore & Philadelphia Steamboat Co. v. Norton*, deputy commissioner, 284 U.S. 408 (1932); *Fidelity & Casualty Co. v. Burris*, 59 F. (2d) 1042 (App. D.C. 1932); *Associated General Contractors*

(33 U.S.C. 920), that "it shall be presumed, in the absence of substantial evidence to the contrary" that such claim comes within the statute. The rights, remedies and procedure under the Act are governed exclusively by that statute.² The findings of fact of the deputy commissioner are presumed to be correct.³ If such findings of fact are supported by evidence

v. Cardillo, deputy commissioner, 106 F. (2d) 327 (App. D.C. 1939); *DeWald v. Baltimore & Ohio R. R. Co.*, 71 F. (2d) 810 (C.C.A. 4, 1934), cert. den. 293 U.S. 581.

² *Associated Indemnity Corp. v. Marshall, deputy commissioner*, 71 F. (2d) 235 (C.C.A. 9, 1934); *Shugard v. Hoage, deputy commissioner*, 89 F. (2d) 796 (App. D.C. 1937); *Luyk v. Hertel*, 242 Mich. 445, 219 N.W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton*, 9 S.W. (2d) 65 (Tex. 1928); *Nierman v. Industrial Comm.*, 329 Ill. 623, 161 N. E. 115 (1928); *Town of Albion v. Industrial Commission*, 202 Wis. 15, 231 N.W. 249 (1930). Compare *Bassett, deputy commissioner v. Massman Construction Company*, 120 F. (2d) 230 (C.C.A. 8, 1941), cert. den. 314 U.S. 648.

³ *Anderson v. Hoage, deputy commissioner*, 70 F. (2d) 773 (App. D.C. 1934); *Luckenbach Steamship Co. v. Norton, deputy commissioner*, 96 F. (2d) 764 (C.C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson, deputy commissioner*, 141 F. (2d) 964 (C.C.A. 5, 1944).

they should be regarded as final and conclusive and not subject to judicial review.⁴

Deductions and inferences which may be and are drawn by the deputy commissioner from the evidence are the equivalent of established facts and are not judicially reviewable.⁵ Even if the evidence permits conflicting inferences, the inference drawn by the

⁴ *Marshall, deputy commissioner v. Pletz*, 317 U.S. 383 (1943); *South Chicago Coal & Dock Co. v. Bassett, deputy commissioner*, 309 U.S. 251 (1940); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U.S. 162 (1933); *Jules C. L'Hote v. Crowell, deputy commissioner*, 286 U.S. 528 (1932); *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); See 71 C. J. 1297, Sec. 1268.

⁵ *Liberty Mutual Insurance Co. v. Gray, deputy commissioner*, 137 F. (2d) 926 (C.C.A. 9, 1943); *Michigan Transit Corporation v. Brown, deputy commissioner*, 56 F. (2d) 200 (D.C. Mich. 1929); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner*, 21 F. Supp. 535 (D.C. Me. 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner*, 23 F. Supp. 748 (W.D.N.Y. 1938); *Simmons v. Marshall, deputy commissioner*, 94 F. (2d) 850 (C.C.A. 9, 1938); *Lowe, deputy commissioner v. Central R. R. Co.*, 113 F. (2d) 413 (C.C.A. 3, 1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941).

deputy commissioner is not subject to review and will not be reweighed.⁶

As this court recently stated in the similar case of *Contractors, PNAB, v. Pillsbury, deputy commissioner*, F. (2d) (C.C.A. 9, No. 10,950, decided June 22, 1945) :

“There was evidence covering material facts before the Deputy Commissioner which would support the order of award. Logical deductions and inferences which may be and are drawn by him from the evidence should be taken as established facts and are not judicially reviewable. *Liberty Mutual Insurance Co. v. Gray*, 137 F. (2d) 926 (C.C.A. 9); *Simmons v. Marshall*, 94 F. (2d) 850 (C.C.A. 9); *Crowell v. Benson*, 285 U.S. 22, 46; *Parker v. Motor Boat Sales*, 314 U.S. 244, 246. Even if the evidence permits conflicting inferences, the inference drawn by the Deputy Commissioner is not subject to review and will not be reweighed. *Liberty Mutual Ins. Co. v. Gray*, *supra*; *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 260, 261; *Norton v. Warner Co.* 321 U.S. 565, 566. The Deputy Commissioner is not bound to accept the opinion or theory of any particular medical expert but he

⁶ *South Chicago Coal & Dock Co. v. Bassett, deputy commissioner*, 309 U.S. 251 (1940); *Parker, deputy commissioner v. Motor Boat Sales Inc.*, 314 U.S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, deputy commissioner*, 137 F. (2d) 926 (C.C.A. 9, 1943); *Lowe, deputy commissioner, v. Central R.R. Co.*, 113 F. (2d) 413 (C.C.A. 3, 1940); *Henderson, deputy commissioner, v. Pate Stevedoring Co., Inc.*, 134 F. (2d) 440 (C.C.A. 5, 1943).

may rely upon his own observation and judgment in conjunction with all of the evidence before him. *Zurich Gen. Accident Co. v. Marshall*, 42 F. (2d) 1010; *Liberty Mutual Ins. Co. v. Marshall*, 57 F. Supp. 177-178.”⁷

It is solely within the province of the deputy

⁷ In the case at bar moreover, the experts were divided. While the physicians employed by appellants thought the injury could not cause the disability, the expert appointed by the deputy commissioner was of a contrary opinion. The courts have uniformly held that the deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. Even in the absence of a difference in medical opinion he may rely upon his own observation and judgment in conjunction with the evidence: *Liberty Stevedoring Co. v. Cardillo*, deputy commissioner, 18 F. Supp. 729 (E.D., N.Y. 1937); *Joyce v. United States Deputy Commissioner*, 33 F. (2d) 218 (D.C. Me., 1929); *Jarka Corp. v. Norton*, deputy commissioner, 56 F. (2d) 287 (E.D. Pa., 1930); *Booth v. Monahan*, deputy commissioner, 56 F. (2d) 168 (D.C. Me., 1930); *Zurich Gen. Accident Co. v. Marshall*, deputy commissioner, 42 F. (2d) 1010 (W.D. Wash., 1930); *Baltimore & Ohio R.R. Co. v. Clark*, deputy commissioner, 56 F. (2d) 212 (D.C. Md., 1932); *Ryan Stevedoring Co. v. Norton*, deputy commissioner, 50 F. Supp. 221 (E.D. Pa., 1943); *Liberty Mutual Ins. Co. v. Marshall*, deputy commissioner, 57 F. Supp. 177 (W.D. Wash., 1944). Cf. *Southern Steamship Co. v. Norton*, deputy commissioner, 41 F. Supp. 108 (E.D. Pa., 1941), aff'd. 128 F. (2d) 263 (C.C.A. 3, 1942); *McNeelly v. Sheppeard*, deputy commissioner, 89 F. (2d) 956 (C.C.A. 5, 1937); *Frank Marra Co. v. Norton*, deputy commissioner, 56 F. (2d) 246 (E.D. Pa. 1931); *Independent Pier Co. v. Norton*, deputy commissioner, 54 F. (2d) 734 (C.C.A. 3, 1931).

commissioner or compensation administrator to determine the credibility of witnesses, and he may accept and believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability. *Wilson & Co., Inc. v. Locke, deputy commissioner*, 50 F. (2d) 81 (C.C.A. 2, 1931). Cf. *Rakowski's Case*, 173 N.E. 521, 273 Mass., 363 (1930); *Benjamin v. Rosenberg Bros.*, 167 N.Y.S. 650 (1917), aff'd. 223 N.Y. 569. And, notwithstanding sharp conflict in the evidence, the injured employee's testimony alone is sufficient to sustain an award in his favor. *Independent Pier Co. v. Norton, deputy commissioner*, 54 F. (2d) 734 (C.C.A. 3, 1931).

In considering the evidence and drawing inferences the deputy commissioner may give weight to "the common-sense of the situation". *Commercial Casualty Ins. Co. v. Hoage*, 75 F. (2d) 677, 678 (App. D.C., 1935); *Avignone Freres, Inc. v. Cardillo, deputy commissioner*, 117 F. (2d) 385 (App. D.C., 1940).

That is what the deputy commissioner may well have done in the instant case: applied "the common-sense of the situation". Where an accident results in immediate injury and disability, such as the strained back and sacroilliac injury suffered by Haddon, and the pain and disability is more or less continuous from that time on, the condition not having existed

before the accident, the causal connection between the accident and the subsequent disability of the back is fully established by evidence of such facts and circumstances and does not require support by medical opinion. *Wroten v. Woodley Petroleum Co.*, 12 La. App. 348, 124 So. 542 (1929); *Pierron v. Prudential Ins. Co.*, 65 Ohio App. 465, 30 N.E. (2d) 563, 567 (1942). In *Jarka Corp. v. Norton, deputy commissioner*, 56 F. (2d) 287 (E.D. Pa., 1930), the court said:

“ * * * I am unwilling to hold that a claimant in order to establish a case for compensation, must produce expert medical testimony to substantiate his claim, where it is proved that he sustained a fracture of the back and is now unable to work, and where the disability, not having existed before the injury, has been more or less *continuous since the injury*. I am also unwilling to hold that the commissioner is bound to accept the opinion of a medical expert for a respondent merely because uncontradicted. It seems to me that to sustain his contention that the award is not in accordance with law would require the court to adopt either of the foregoing rules.”
(Italics supplied)

Appellants (their Br. p. 21) attempt to distinguish this case by stating that in the *Jarka* case “the injury was of a traumatic nature, produced by a falling object”. Appellants certainly can not seriously maintain that an employee’s back must be fractured

or that the injury must occur by a falling object or both to render it a *traumatic* injury. Any bodily injury or wound, as distinguished from disease, is traumatic. Moreover, the Longshoremen's Act in its definition of injury (sec. 2(2), 33 U.S.C. 902(2)) does not restrict compensability to traumatic injuries. Other cases holding to the same effect as the *Jarka* case are: *Dinoni v. Vulcan Coal Co.*, 132 Kans. 810, 297 Pac. 721 (1931); *Utah Delaware Min. Co. v. Industrial Commission*, 76 Utah 187, 289 P. 94 (1930). In the *Utah* case, *supra*, the Court said:

“Notwithstanding the opinion expressed by the attending physician — it was but an opinion — that he saw no connection between the present disabilities of the applicant and the injuries sustained by him at the time of the accident, nevertheless the commission had before it sufficient evidence to justify a finding that the disabilities were attributable to the accident. The nature and extent of the injuries occasioned by the accident and the parts of the body injured and affected, and the physical condition of the applicant thereafter from the time of the accident until the hearing, were all fully described and laid before the commission. Whether the present disabilities were or were not attributable to the injuries received at the time of the accident, constituted the ultimate fact or question to be determined by the commission. They were not bound to accept a mere opinion of an expert on such an ultimate question, unless such was the only reasonable conclusion to reach in the premises. * * * The applicant, prior to the accident,

having been healthy and able-bodied and having no prior kidney or bladder trouble and no sickness of any kind, and receiving a rather severe injury in the region of the kidney, together with evidence that he thereafter almost continually suffered and complained of pain in that region, and not anything to show that the diseased and infectious conditions were attributable to another cause, the natural cause to which they may be attributable is the injury received at the time of the accident. We thus think the evidence sufficient to support the findings in such respect."

In the *Dinoni* case, *supra*, the Court said:

"When all the facts and circumstances of an injury, its treatment, changes, and results, are before the compensation commissioner, and later before the district court; and also the opinion of a physician, *the latter can not be said to be the undisputed evidence in the case, if the facts and circumstances reasonably tend to show or indicate a different conclusion from that expressed in his opinion.*" (Italics supplied)

Even in those cases where there was no medical evidence of causal relationship but there was *other evidence* thereof, the federal courts have uniformly sustained an award of compensation. In *Southern Steamship Co. v. Norton*, deputy commissioner, 41 F. Supp. 108, (E.D. Pa., 1941), the court said:

"The medical testimony was no stronger in the Di Giorgio case than in the case at bar. There, as here, no physician positively established a causal relation between the accident and the injury; *nor was there any medical testimony even that the accident probably caused the injury.*

One physician said it was a doubtful case: the physicians in general could not conclude definitely that the accident was the cause of the cataractous condition. Obviously, the Deputy Commissioner in the Di Giorgio case reached his conclusions that the injury and the cataractous condition did result from the accident from other and nonmedical testimony in the case.

“I reach the same conclusions in the instant case, to-wit, that the absence of medical testimony definitely or positively establishing a causal relation between the accident and the loss of vision does not rob the findings and award of the Deputy Commissioner of validity, provided there is any other testimony to support them. That other testimony is furnished by the employee himself, including the testimony that his vision, good before the accident, was impaired thereafter.” (Italics supplied)

In *Frank Marra Co. v. Norton*, deputy commissioner, 56 F. (2d) 246 (E.D. Pa., 1931), the court said:

“The further proposition which bears the brunt of the argument is to the effect that the cause of a death is within the peculiar province of expert opinion and that a finding must have as one of its supports the testimony of an expert. It is urged that the finding of the cause of death in this case is without such support, inasmuch as the expert testimony was not that the death was due to injuries received in the course of employment, but merely that it might have been so due. In this view, the death may have resulted from any one or two or more causes, one of which was traumatic. If the testimony of the experts were all the evidence in support of the fact finding

made, it is clear that it would give equal support to any one of several different findings. There was, however, other evidence. An acceptance of the argument, addressed to us would closely approach the proposition that no finding of a cause of death can be made which does not have the support of expert opinion. This latter proposition we cannot accept. Whenever opinion evidence is admissible, the opinion of an expert is evidence, but it is in itself nothing more. It may be convincing or unconvincing. It may in itself be all sufficient to support a finding, but it does not follow that a finding may not be made without it. To hold otherwise would be to rule in effect that it is not for the fact finding tribunal, but for the experts, to find the cause of death."

In *Ryan Stevedoring Co. v. Norton*, deputy commissioner, 50 F. Supp. 221 (E.D. Pa., 1943), the court said:

"While it is true that the sole medical testimony in the case shows no causal connection between the accident and the disability for which the challenged award of compensation was made, it has been held that such causal connection need not be established by medical testimony, but that the Deputy Commissioner may rely upon his own observation and judgment in conjunction with the evidence. *Southern Steamship Co. v. Norton*, 41 F. Supp. 108, affirmed 128 F. (2d) 263, C.C.A. 3; *Frank Marra Co. v. Norton*, 56 F. (2d) 246. It has further been held that the Deputy Commissioner is not bound by the uncontradicted testimony of medical witnesses where other evidence warrants a different conclusion. *Wood Preserving Corp. v. McManigal*, 39 F. Supp. 177; *Jarka Corp. of Philadelphia v. Norton*, 56 F. (2d) 267."

The decisions under the Longshoremen's Act to the effect that the trier of the facts may rely upon evidence of the facts and circumstances in determining whether the employee is disabled and whether such disability results from the injury accord with the decisions of the state courts under the various compensation laws. See *Liberty Mutual Insurance Company v. Williams*, 44 Ga. App. 452, 161 S.E. 853 (1932); *Kempa v. Pittsburgh Terminal Coal Corporation*, 133 Pa. Super. 392, 3 A. (2d) 34 (1938), where the court said:

"The connection between the injury, which resulted from a fall of coal that buried claimant to his waist, and the disability which followed was not remote but so direct and natural that an award does not depend solely on the testimony of the professional witnesses; essential facts to support it were established by other competent evidence." (Citing cases)

"Taking into consideration all the testimony offered by claimant, we have no difficulty in reaching the conclusion that the granting of the award was fully justified * * * the fact-finding body has a right to use the conclusions and tests of ordinary every-day experience and draw the inference which reasonable men would thus draw from similar facts."⁸

⁸ Cf. *Southern Cement Co. v. Walthall*, 217 Ala. 645, 117 So. 17 (1928); *M. P. Moller Motor Car Company v. Unger*, 166 Md. 198, 170 A. 777, 780 (1934); *Pierron v. Prudential Insurance Company*, 65 Ohio

B. The Findings of Fact Are Fully Supported by Evidence.

The following is a reference to so much of the testimony taken at the hearings before the deputy commissioner as is considered sufficient to show that the findings of fact complained of are fully supported by evidence. This reference is not intended to cover all of the testimony as under the applicable decisions it is necessary only to show that there is evidence to support the findings of fact of the deputy commissioner.

Tex M. Haddon, the claimant, at the first hearing on December 29, 1943, testified in part as follows: That some time in the latter part of May or early in June 1942, while employed by this employer as a plumber at Barber's Point Camp on the Island of Oahu, and when with two other employees he was attempting to stand up a long section of heavy pipe, he felt something "snap" low down in his back; that

App. 465, 30 N. E. (2d) 563, 567 (1941); *Provident Life and Acc. Ins. Co. v. Diehlman*, 259 Ky. 320, 82 S.W. (2d) 350, 353 (1935); *Schroeder v. Western Union Tel. Co.*, 129 S.W. (2d) 917, 921-922 (Mo. App., 1939); *De Filippo's Case*, 284 Mass. 531, 188 N.E. 245, 247 (1933); *Hartford A. and I. Co. v. Industrial Com.*, 64 Utah 176, 228 Pac. 753, 754 (1924); *Ross v. Riffle*, 210 Pa. 176, 164 Atl. 913, 915 (1932).

when this happened everything turned black for a second but he did not realize anything serious had happened; he told the two men with him, Clements and Gibbs, that he had hurt his back and he immediately sat down; he experienced a "long glimmer before his eyes like a heat wave"; he had no medical attention at the time but from then on was troubled with backache and cramping of his legs, although until December 17, 1942 (R. 15, 16) he continued to work on light work to which he had been assigned after reporting his injury to his foreman, Arthur Lukehardt.⁹ Haddon also testified that immediately after the injury, Mr. Lukehardt told Haddon to take it easy and not to lift anything; that Forrest E. Williams, who was foreman and superintendent, also

⁹ An award for total disability may be proper, notwithstanding evidence indicating that an injured employee is able to perform so-called light work: *Eastern Steamship Lines, Inc., v. Monahan, deputy commissioner*, 21 F. Supp. 535 (D.C. Me., 1937); *Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner*, 26 F. Supp. 944 (D.C. Me., 1939), *aff'd*, 110 F. (2d) 840; *Zurich Gen. Accident Co., Ltd. v. Marshall, deputy commissioner*, 56 F. (2d) 652 (W. D. Wash., 1931); *Zurich Gen. Accident Co., Ltd. v. Marshall, deputy commissioner*, 42 F. (2d) 1010 (W.D. Wash. 1930); *Liberty Mutual Casualty Ins. Co. v. Locke, deputy commissioner*, 60 F. (2d) 35 (C.C.A. 2, 1932); *Reilley v. Carroll*, 147 Atl. 818 (Conn, 1929); *Roller v. Warren*, 98 Vt. 514, 129 Atl. 168 (1925).

knew of Haddon's injury and of this light work to which Haddon had been assigned by Lukehardt as the result of Haddon's injury (R. 19, 20). Haddon further testified that because of his wife's insistence, he went to see Dr. White, who X-rayed Haddon's back some time in February 1943 and that Dr. White wrote Morrison-Knudsen Company, the employer, who took it up with the Liberty Mutual Insurance Company, the carrier (R. 17).

At the later hearing on February 8, 1944, Haddon testified that about April 8 or 10, 1943 he received in the mail a copy of a letter, dated April 6, 1943 from Morrison-Knudsen Company, the employer, addressed to the Nichols Adjustment Bureau (the insurance carrier's representative) transmitting Dr. White's letter and X-ray concerning Haddon's claim (R. 22); that Dr. White gave Haddon a letter, dated April 7, 1943 received by Dr. White from Nichols Adjustment Bureau which stated that Dr. White's letter to Morrison-Knudsen Company had been turned over to them and that they would advise the doctor and Haddon concerning the latter's treatment and the status of his claim (R. 23, 24); that pursuant to a request in a letter to Haddon from the Nichols Adjustment Bureau dated May 29, 1943, he went, as directed, to a hospital for an examination of his in-

jury; that he remained there about a week (R. 25, 26); that pursuant to further requests in two other letters from the Nichols Adjustment Bureau, dated July 12, 1943, and September 3, 1943, respectively, Haddon went for further examination to a San Francisco hospital, where he spent about four days being examined by the plaintiff's doctors (R. 29-31).

Haddon further testified that at the time of his injury his contract called for wages of \$225.00 per month but that the actual scale was much above that so that he actually earned from \$109.00 to \$120.00 per week; that he started to work there on January 22 or 23, 1942, and continued to work even after his injury in June 1942 (R. 33); that he reported his injury immediately to Mr. Lukehardt, his foreman, who within 30 minutes, put him on light work where he would do no lifting (R. 35); that prior to his injury his health had been good and his legs or back had never bothered him but that since his injury he has continually suffered from a painful back and legs so that he can hardly stand up, is unable to stay on his feet any length of time and feels as if he has been cut in two and the two sore edges come together; that he experienced that feeling from the time he was injured; that after the injury he went to bed whenever he could (R. 37, 38); that when he returned to the

states he thought he could work and got a job but got to feeling so badly he could not work (R. 39, 40); that the pain in his back is at the particular spot where he felt the snap (R. 43); that he is unable to work although there is plenty of work available.

W. A. McFayden testified in part as follows: That he was also employed as a plumber by the same employer as Haddon, the Morrison-Knudsen Company; that he never knew Haddon until they met in signing up on the job; that he roomed with Haddon on the job and saw him every day (R. 58) and prior to the injury Haddon was always "peppy and full of life" and was considered one of the hardest workers in their group of 50 or 60 men (R. 59); that Haddon told McFayden of Haddon's injury either on the day it happened or on the next night when he came in after work; that after the injury had happened, Haddon would not fool around as had been his habit but spent a lot of his time in his bunk just as soon as he left the mess hall at night; that Haddon did not go up town as was his custom before and never went to Honolulu on his days off as he used to; that he complained continually of his back and legs bothering him since his injury and used to put a jacket under his mattress to give some support to his back; that he

did the light work to which he had been assigned after his injury (R. 60, 62).

Forrest E. Williams testified as follows: That during 1942 he was employed as general plumber foreman with the Pacific Naval Air Bases and that Haddon was employed directly under his subforeman, who reported Haddon's injury to him and that Haddon was immediately given light work and kept on the job by his instructions (R. 109-111).

Dr. H. J. Wyckoff, who examined claimant on February 9, 1944 at the direction of the deputy commissioner (R. 71), reported in part as follows:

“History: This man states that in June, 1942, while raising or holding some heavy pipe above his head, he felt a snapping sensation in the lower back. He said that things sort of went black for a moment and he put his hand on his back. He states that he seemed to have some disturbance of control of the legs so after reporting to the office he was put on lighter work. Following this he had severe pain in the back and sort of cramping sensations in both legs, more severe in the left. He states that soon after this he returned to the States and after arriving here he developed a rather severe cold and with this he had a severe knife like pain in the lower back.

“Present Complaints: He states that at the present time the condition is somewhat improved but he still has some pain in the lower back and a feeling of tightening of the muscles in the lower extremities. He states that he has a pump-

ing sensation in the ankles, knees and hips. He states that following the original trouble the pain seemed to be referred down the left thigh and left leg as far as the foot. He also had pain which he felt was referred up in the region of the right shoulder and right upper arm.

“Past History: He states that he has never had any previous injuries and no previous back trouble. He has never had any operations.

“Examination: This man is 49 years of age. 5 feet 11 inches in height and weighs about 165 pounds. He can bend forward to within 12 inches of the floor. Backward bending is markedly limited, at least 50%, lateral bending is limited about 50%, in each direction in the lumbar region and rotation is limited about 25%, in each direction, in the lumbar region. Motion of the cervical and dorsal spine seems to be fairly free. He has good motion of the left upper extremity. He has good motion of the right elbow, wrist and fingers. The right shoulder is markedly limited, can be abducted about 60 degrees, rotation is limited about 50% in each direction, with a complaint of pain in the region of the right shoulder joint. He complains of tenderness over the lumbo-sacral region and out over the superior gluteal region on either side. There is a dulling of sensation over the outer side of the left leg and foot, sensation otherwise seems to be normal.

“The abdominal, cremasteric and patellar reflexes are equal and active, the right Achilles reflex is present, the left is entirely absent. On measurement about the calf regions, the left is $\frac{1}{4}$ inch less than the right. Measurements about the lower thigh, the left is 1 inch less than the

right, over the midhigh the left is $\frac{3}{8}$ inch less than the right. He has intermittent spasm of the lower back muscles but does not have a fixed protective spasm of these muscles.

"The eyes appear normal, pupils reacting to light and accommodation. All of the teeth have been extracted and he is wearing upper and lower plates. The tonsils are small. Measurements about the arms and forearms are practically the same on both sides. This man is normally right handed.

"This man shows a relaxation of the right wrist, with considerable forward and backward motion at the wrist joint or through the carpal joints, which he states was due to an old injury during the last world war. He states there was no injury to the shoulder at that time as far as he knows, although there may have been an injury to the right shoulder at that time.

"X-Rays: Of the right shoulder show no definite pathology in the region of this shoulder, except possibly a slight narrowing of the joint space and some slight bone atrophy of the bones about this joint. X-Rays of the lumbosacral spine show no pathology in the lateral view, except a slight narrowing of the intervertebral space between the 4th and 5th lumbar vertebrae, in the lateral view. There seems to be a very slight lipping of the 5th lumbar vertebra.

"Conclusions: The clinical findings and history of this man's case are very typical of a displaced intervertebral disc between the 5th lumbar vertebra and the sacrum, on the left side. There is also some pathology in the region of the right shoulder which is probably in the nature of an

arthritis involving this shoulder joint. I think it is possible that the lesion which he has at the present time occurred at the time of his accident, of June, 1942. The condition of the right shoulder is probably an inflammatory condition and does not seem to be definitely connected with his injury.

“I would recommend an operation for this man’s back, exploring the region between the lumbar vertebrae and the sacrum on the left side. This is a case which probably will not need to be fused but this should be determined at the time of operation.” (R. 112-115)

It is believed that the evidence referred to above discloses unmistakably a situation of continuing disability from the moment the claimant first felt the “snap” in his back, when the injury occurred, until the date on which he ultimately became disabled. Under the settled law that the deputy commissioner should take a common sense view of the questions involved, especially where medical testimony conflicts, it is impossible to see how anyone reading the record could have come to any other conclusion than that the back injury caused the claimant’s disability. It is accordingly submitted that the action of the deputy is fully supported by the evidence and must be sustained.

II

APPELLANTS' CLAIMS OF ERROR IN THE
FINDINGS OF THE DEPUTY COMMISSIONER
ARE GROUNDLESS AND DEVOID OF MERIT*A. The Objection That Claimant Did Not Sustain
An Injury Is Made Too Late.*

Appellants seek for the first time in this court to raise the issue that claimant's back strain and sacroiliac displacement do not constitute an injury. The only issues raised by Appellants in the court below are stated in paragraph VIII of the complaint as follows:

“That said Compensation Order and Award of Compensation is not in accordance with law and with the provisions of said act, in this, that there was not at any time herein mentioned or at any other time, any substantial evidence before said respondent to support the finding that because of said injury, claimant was wholly disabled and that such disability continued at the time of the hearing in this matter held on February 8, 1944. That said Compensation Order and Award of Compensation is furthermore not in accordance with law and with the provisions of said act in this, that there was not at any time herein mentioned or at any other time, any substantial evidence before said respondent to support the finding that the average annual earnings of the claimant at the time of said injury amounted to the sum of \$5,668.00, * * * ”

Appellants on this appeal now appear to abandon

the issue regarding Haddon's earnings and wage rate, so that the only issue now properly before this Court is the cause and extent of his disability. Never until their opening brief in this Court did Appellants raise the issue that Haddon did not sustain an injury. Appellants neither raised that issue in the court below nor did they name it in their "Statement of Points on Which Appellants Intend to Rely on Appeal" (R. 132, 139), nor even in the "Specification of Errors" of their brief (p. 8), did they include as an issue the contention that an "injury" was not sustained. When Appellants attempt to include as Point II of their Argument (their Br. p. 12) that "the record fails to disclose that an 'injury' was sustained", they seek to raise an issue which is not, and can not on the record be brought before this Court.

It is a well settled rule that an issue which is raised for the first time upon appeal will not be considered by the appellate court. *Helvering v. Tex-Penn Co.*, 300 U.S. 481, 498 (1937); *Ex parte Keiyo Kamiyama*, 44 F. (2d) 503, 505 (C.C.A. 9, 1930); *Hecht v. Alfaro*, 10 F. (2d) 464, 466 (C.C.A. 9, 1926); *Kortz v. Guardian Life Insurance Co. of America*, 144 F. (2d) 676, 679 (C.C.A. 10, 1944); *Goldie v. Cox*, 130 F. (2d) 695, 715 (C.C.A. 8, 1942); *Reconstruction Finance Corp. v. Sun Lumber Co.*, 126 F.

(2d) 731, 738 (C.C.A. 4, 1942); *Ramming Real Estate Co. v. United States*, 122 F. (2d) 892, 893 (C.C.A. 8, 1941); *Atlantic Brewing Co., Inc. v. Wm. J. Brennan Grocery Co.*, 79 F. (2d) 45, 47 (C.C.A. 8, 1935). But if it were open to appellants to raise the issue at this late date still there can be no doubt that a “snap” or “darting pain” in the back while undergoing strenuous exertion in lifting followed by weakness and growing incapacity is plainly an injury. A case substantially on all fours is *Jarvis’ Case*, 274 Mass. 305, 174 N.E. 484 (1931). Cf. *Magazine v. Shull*, 60 N.E. (2d) 611 (Ind. App., 1945); *Commercial Casualty Ins. Co. v. Hoage, deputy commissioner*, 75 F. (2d) 677, 678 (App. D.C., 1935), cert. den. 295 U.S. 733.

B. Appellants’ Authorities Are Inapplicable to the Case at Bar

Appellants (Br. p. 15) quote at length from an annotation in 135 A.L.R. 516. The substance of the quotation is that testimony to the effect that an injury “might have”, “may have”, or “could have” caused, or “possibly did” cause the disability,—where such testimony stands alone,—is insufficient. The annotation quoted from, however, only assumes to deal with cases where the expert evidence may be necessary to establish the causal relation in a given case

“because no other evidence, sufficient in itself, is available to establish such connection”. It further recognizes that there are cases where no medical or other expert evidence as to the causal connection is necessary. Thus, in the preliminary statement it is said: “*Questions as to the necessity of medical or other expert evidence as to the causal connection between an accident or injury and subsequent illness or death are not treated herein.*” (Italics supplied). Moreover, in the very annotation from which Appellants quote, there are eight pages (pp. 532-539 inclusive) devoted to cases where medical evidence of the *possibility of causal connection* between the injury and disability when taken *in conjunction with other evidence although slight* was considered adequate proof of causal relationship. At least 16 of the cases there cited follow that principle. The case of *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 A. (2d) 99, 135 A.L.R. 537 (1941), relied on by Appellants appears to be the only decision cited by the annotation of holding *contra*.

Similarly Appellants quote at length (Br. 26) from 32 C.J.S. p. 399 to the effect that expert testimony is to be accepted as conclusive by “the jury or other trier of facts.” But the passage by its own terms refers only to situations “within the knowledge

of experts only” and to cases of “undisputed expert testimony”. None of these conditions is present here. Under the law the deputy commissioner is not to be assimilated to a jury. He is presumed to have special experience and skill in the appreciation of conflicting evidence on just such issues as are here involved. In addition, the question of causation is not one exclusively within the competence of experts but turns on common sense considerations as well and the deputy commissioner is to approach it in a common sense and reasonable fashion. Finally, the medical testimony in the case at bar was not undisputed but on the contrary the testimony of the unbiased expert designated by the deputy commissioner differed from those employed and paid by the employer and its carrier.

In the case of *Contractors PNAB v. Pillsbury, deputy commissioner*, F. (2d) (C.C.A. 9, No. 10,950), this Court on June 22, 1945 adopted the principle that causal relationship between injury and subsequent disability may be proven by conflicting medical testimony to the effect that the disability *could* have been caused in the manner found by the deputy commissioner. It is submitted that nothing in the texts or cases cited by appellant requires this Court to depart from its previous decision and the

weight of authority and to overrule that decision or distinguish its application in the case at bar.¹⁰

¹⁰ The latest reported decision on the subject, namely, *Magazine v. Shull*, 60 N.E. (2d) 611 (Ind. App., 1945), is in accord with the weight of authority that attendant facts and circumstances may be sufficient to establish causal relationship, particularly where there is medical evidence to the effect that the disability could result from the injury. There the employee sustained an internal injury while lifting, followed by pain, hemorrhages and ultimate blindness. Up to the time of the injury he never had any trouble with his eyes and his sight was good. There was medical evidence to the effect that hemorrhages could exsanguinate the retinas, followed by optic atrophy. The employer claimed that the record was devoid of proof of any causal connection between the accident and the hemorrhages. The court, however, stated that the trier of the facts may reasonably draw an inference from the "other" established facts and this is so even though the subject is a matter of scientific knowledge. The court further stated that a reasonable mind may very well infer a causal connection between the accident and the hemorrhages.

CONCLUSION

It is respectfully submitted that there was evidence before the deputy commissioner to support his finding that the employee was disabled as a result of the injury to his back and that the order of the court below dismissing the complaint was proper and should be affirmed.

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No. 10992

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pensation Commission for the Four-
teenth District, and TEX HADDON,

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
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Reply Brief of Appellants

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PRELIMINARY STATEMENT

Appellees, in their enthusiasm to state the facts in the strongest possible light, overstate themselves on page 5 in saying that the evidence is “*uncontradicted* that the employee sustained an injury to his back while working and was immediately given lighter work,” etc. Such a statement completely ignores the testimony of Ar-

thur E. Lukehardt, claimant's immediate superior, who testified that "there was no change in the type of work he performed" (Tr. 99). Also, the statement that "his fellow *employees* and *superiors* testified that the employee was a good worker and in full vitality before the injury and that after the injury he continually complained of his back and legs and would retire to his bunk after work, following his evening meal," is not borne out by the record. Only one fellow employee testified in favor of claimant, and he admitted that he was not present when the alleged injury took place. No *superior* testified to the effect claimed by appellees. In fact both superiors who testified said nothing whatsoever concerning claimant's vitality before and after the alleged injury, nor about his activities following the day's work.

Again at page 6, appellees refer to the testimony of fellow *employees* and *superiors* who "testified to the injury and to its immediate and continued effects." In the first place, only one fellow employee testified, so why the use of the plural? In the second place, that fellow employee admittedly did not work alongside claimant at the time of the alleged injury, and consequently could give no testimony as to the alleged occurrence. As to the "superiors" testifying to that effect, the record again fails to measure up to appellees' expectations. Only two testified—Lukehardt and Williams. Lukehardt, the sub-foreman, under whose direct

supervision claimant worked, could not remember any accident being reported to him at all, although he did recall Haddon's chronic complaints about his back, which Haddon did not attribute to any alleged accident. He also testified there was no change in the type of work Haddon performed after June, 1942. Williams, who was the general plumbing foreman, merely testified that he recalls the sub-foreman reporting an accident to him verbally, that Haddon complained to him about his back at various times, without attributing his trouble to any particular incident, and that he was given lighter work to perform because of his back. How does this bear out appellees' contention the "superiors" testified to the injury and its immediate and continued effects?

On the contrary it is significant that claimant failed to produce even one fellow employee who actually witnessed the alleged accident, and who could testify as to the injury and its immediate consequences.

REPLY TO APPELLEES ARGUMENT

In the announcement of the general principles of law governing the Longshoremen's Act, appellees are cautious in not admitting that the findings of the deputy commissioner must be supported by *substantial* evidence, which has been defined by the federal Supreme Court as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Consolidated Edison Co. v. Nat. Labor Rel. Board, 305 U. S. 197, 229, 83 L. Ed. 126, 140;

Nat. Labor Rel. Board v. Columbian E. & S. Co., 306 U. S. 292, 299, 83 L. Ed. 660, 665.

This reluctance to make such an admission implies a weakness per se in the facts, for otherwise the issue would not be so studiously avoided.

At page 11, the statement is made that “while the physicians employed by appellants *thought the injury could not cause the disability*, the expert appointed by the deputy commissioner was of a contrary opinion.”

This is an obvious misstatement, for it assumes that the doctors employed by appellants found disability present. Such is not the case however, for both of appellants’ medical experts reported that they found *no disability whatsoever* from either a neurological or orthopedic point of view.

On page 11 also, a number of cases are cited in support of the statement that even in the absence of a difference in medical opinion, the deputy commissioner may rely upon his own observation and judgment in conjunction with the evidence. Each of the cases cited, with the exception of three about to be named, are discussed in appellants’ opening brief, and therefore further comment thereon would be needless repetition.

Liberty Mutual Ins. Co. v. Marshall, 57 F. Supp. 177 (D. C. Wash. 1944), is the subject of appeal in this

court, and therefore should not be accepted as an authority until and unless the decision be affirmed.

In *McNeelly v. Sheppard*, 89 F.(2d) 956 (C. C. A. 5, 1937), the deputy commissioner *denied* compensation. The claimant contended on appeal that his evidence demanded a finding that pneumonia and infection arose naturally out of his employment. Claimants' physician testified in favor of causal relation but admitted that pneumonia could come from other causes, and sometimes without any exposure at all. The circuit court affirmed the *denial* of the award. This is a case therefore where the evidence left it questionable whether the pneumonia was caused by the working conditions or from causes having no connection thereto. The physician's opinion invited only speculation as to the efficient cause.

Therefore denial of an award was perfectly justified, the court making this apt remark which is applicable here:

"Compensation under the act is not the equivalent of health or life insurance."

Independent Pier Co. v. Norton, 54 F.(2d) 734 (C. C. A. 3, 1931), does not involve the issue of causality as such, but merely a question of continuing disability from an injured knee that had already been the subject of a compensation award.

In *Contractors, P. N. A. B. v. Pillsbury* (C. C. A. 9)

..... F.(2d), cited at page 10, the question involved was whether the contraction of pulmonary tuberculosis was due to working conditions. One physician testified that the disease could have developed since the commencement date of the employment. Another physician gave as his opinion that the employee suffered from a reactivated type of the disease. A document from an officer of the Navy Medical Corps confirmed the testimony of the claimant that he was free of tuberculosis before he left the mainland to work on the project. It will therefore be seen that there was ample medical evidence to sustain the finding.

On page 12, appellees' state that notwithstanding sharp conflict in the evidence, the injured employee's testimony alone is sufficient to sustain an award in his favor. However *Independent Pier Co. v. Norton*, 54 F.(2d) 734 (C. C. A. 3, 1931), cited in support thereof, did not involve a question of causal relationship, but merely the degree of disability which the employee was suffering as the result of an admitted injury to the knee. Certainly, that case does not stand for the proposition that an employee's testimony alone is sufficient to establish causality from a medical standpoint.

Also on page 12, appellees argue that the award herein entered may be supported by "the common-sense of the situation." Cited in support thereof are *Commercial Casualty Ins. Co. v. Hoage*, 75 F.(2d) 677 ((App.

D. C. 1935), and *Avignone Freres, Inc., v. Cardillo*, 117 F.(2d) 385 (App. D. C. 1940). In each of those cases there was ample medical testimony to support the award, and the *medical testimony itself* was used in arriving at the "common-sense of the situation."

Conceding *arguendo*, that the causal connection between an accident and the subsequent disability does not require support by medical opinion, where an accident results in immediate injury and disability, and the pain and disability is more or less continuous from that time on, the condition not having existed before the accident, it is submitted that the facts in this case do not fall within the rule. Here we have an employee who lost no time from his work on account of any alleged disability, whose chronic complaints concerned a sore back and leg cramps that he attributed to a vitamin deficiency in the drinking water, to his kidneys, and to his "discomfortable" bed, but never to any alleged accident, *until approximately nine months later when he contracted a cold that settled in his back*, whose work record was exemplary, who finished out his contract and made no claim concerning any alleged accident upon the forms handed to him for that purpose upon returning to the mainland. How can it be said therefore with any convincing force that the award can be supported by the "common sense of the situation" alone?

The cases cited by appellees in support of the propo-

sition that medical testimony is not necessary to establish causal relationship, involve in the most part injuries where the disabilities flowing therefrom are so immediate and obvious, that laymen in ordinary walks of life can infer cause from effect. The cases of *Wroten v. Woodley Petroleum Co.*, 124 So. 542 (La. 1929), and *Pierron v. Prudential Ins. Co.*, 30 N. E. (2d) 563 (Ohio 1942), definitely fall within this category.

It should be noted that in *Dinoni v. Vulcan Coal Co.*, 297 Pac. 721 (Kan. 1931), compensation was *denied* despite the testimony of causal connection by a physician in view of the fact that the other evidence, viz., a second fall producing a fractured kneecap and necessitating an operation, contradicted and raised an issue as to whether the infection developed from the second injury or the first one.

In *Utah-Delaware Min. Co. v. Ind. Com'n*, 289 Pac. 94 (Utah 1930), the applicant was injured severely in the region of the right kidney, and no opinion was advanced and no reason given by the physician that if the diseased and infectious condition of the kidney and of the gall bladder were not attributable to the injury, to what likely or probable cause or causes they were attributable.

The cases of *Jarka Corp. v. Norton*, 56 F.(2d) 287 (D. C. Pa. 1930), *Southern Steamship Co. v. Norton*, 41 F. Supp. 108 (D. C. Pa. 1941), *Frank Marra Co. v. Nor-*

ton, 56 F.(2d) 246 (D. C. Penn. 1931), and *Ryan Stevedoring Co. v. Norton*, 50 F. Supp. 221 (D. C. Penn. 1943), have already been discussed in appellants' opening brief, and therefore further comment herein is unnecessary.

Liberty Mut. Ins. Co. v. Williams (Ga. 1932) 161 S. E. 853, *Kempa v. Pittsburg Terminal Coal Corp.* (Pa. Super. 1938) 3 Atl. (2d) 34, *M. P. Moller Motor Car Co. v. Unger* (Md. 1934) 170 Atl. 777, and *Ross v. Riffle* (Pa. 1932) 164 Atl. 913, are cases where the connection between the injury and disability is so direct and immediate, that the award need not depend upon the testimony of professional witnesses, since laymen in ordinary walks of life can infer cause from effect.

In *Southern Cement Co. v. Walthall* (Ala. 1928) 117 So. 17, there was medical testimony to support causality.

Provident Life & Acc. Ins. Co. v. Diehlman (Ky. 1935) 82 S. W. (2d) 350, is not a compensation case, but an action on an insurance policy. There was medical evidence pro and con as to the cause of death, which clearly presented an issue for the jury.

In *Schroeder v. Western Union Tele. Co.* (Mo. 1939) 129 S. W. (2d) 917, insanity developed within a few hours after a head injury. There was no evidence of pre-existing insanity. In view of the peculiar facts of that case, the causal link could properly have been

found without the aid of medical testimony, since the connection between the injury and disability was natural, direct and immediate.

In *De Filippo's case* (Mass. 1933) 188 N. E. 245, the court recognizes the rule that where the relation between cause and effect must be proved, an expert's testimony that such relation is merely "possible," "conceivable" or "reasonable" without more, is insufficient to prove relation.

In *Hartford A. & I. Co. v. Ind. Com'n* (Utah 1924) 228 Pac. 753, the question was whether Parkinson's disease was caused by a fall suffered about five months previously. Four physicians testified as to the nature of the disease and to its probable causes. While none of them were very conclusive in their opinions, there was testimony that the injury was the *probable* cause. This coupled with the pre-existing good health of the employee and the doctor's failure to attribute the disease to other causes, was held sufficient to sustain the award.

CONCLUSION

It is surprising that while appellees saw fit to devote considerable space in their brief to the announcement of general principles and citations therefor which appellants frankly conceded at the outset, they failed to discuss or even refer to three decisions cited by appellants which go to the very essence of this appeal. They

are *Standard Acc. Ins. Co. v. Nicholas*, 146 F.(2d) 376 (C. C. A. 5, 1944), *Pacific Employers Ins. Co. v. Ind. Acc. Com.*, 118 P.(2d) 334 (Cal. 1941), and *Cutler v. Bergen, etc. Co.*, 25 Atl. (2d) 75 (Pa. 1942). And of *Burton v. Holden & Martin Lbr. Co.*, 20 Atl. (2d) 99 (Vt. 1941), the only comment is that it “appears” to be a minority holding. The failure to discuss or attempt to distinguish these cases by giving them this silent treatment can only mean that these authorities directly sustain appellants’ position and if followed by this court, would result in a setting aside of the award entered herein.

Respectfully submitted,

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